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Y4.J89/2:S.hrg.99-437

S. HRG. 99-437

ABORTION FUNDING RESTRICTION ACT

Nº 130 ORIGINAL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 522

A BILL TO AMEND THE CIVIL RIGHTS ACT OF 1964 TO PROTECT THE RIGHTS OF THE UNBORN

APRIL 2 AND JULY 22, 1985

Serial No. J-99-13

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
54-781 O WASHINGTON : 1986

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CONTENTS

OPENING STATEMENTS

Page

Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah, chairman, Subcommittee on the Constitution 1, 81

Metzenbaum, Hon. Howard M., a U.S. Senator from the State of Ohio 5

DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona 7

PROPOSED LEGISLATION

S. 522—A bill to amend the Civil Rights Act of 1964 to protect the rights of the unborn 4

CHRONOLOGICAL LIST OF WITNESSES

Tuesday, April 2, 1985

Rosenblum, Victor G., professor of law and political science, Northwestern University 10

Dorsen, Norman, president, American Civil Liberties Union 35

Destro, Robert A., assistant professor of law, Catholic University of America 47

Simmons, Althea T.L., director, Washington Bureau, National Association for the Advancement of Colored People 73

Monday, July 22, 1985

Packwood, Hon. Bob, a U.S. Senator from the State of Oregon 83

Leland, Hon. Mickey, a Member of the House of Representatives from the State of Texas 87

James, Kay, public relations director, National Right to Life 90

Taylor, William L., director, Center for National Policy Review 122

Bopp, James, Jr., Esq., Brames, Bopp, Haynes & Abel 128

Masterson, Byron J., M.D., University of Louisville School of Medicine 150

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Bopp, James, Jr.:
  Testimony 128
  Prepared statement 136
Destro, Robert A.:
  Testimony 47
  Prepared statement 50
Dorsen, Norman:
  Testimony 35
  Prepared statement 40
  Letter to Senator Hatch 46
Hatch, Hon. Orrin G.:
  State restrictions on abortion funding 9
  Memorandum to David Dean, Re: Baylor University Medical Center, Medicare and Medicaid as Federal financial assistance 25
  Potential Use of Federal Financial Assistance to Perform Abortions, from the Congressional Research Service, Library of Congress 34
  Abortion and the Supreme Court, March 1984 62
  On the Abortion Issue, Technology Works Both Ways, by Doris Gordon, from the Washington Post Health, March 20, 1985 72

Page

Hatch, Hon. Orrin G.—Continued
  - The Health Impact of Restricting Public Funds for Abortion, October 10, 1977-June 10, 1978, from AJPH, September 1979, vol. 69, No. 9 115
  - The Hyde Amendment in Action, by Willard Cates, Jr., MD, MDH, from JAMA, September 4, 1981, vol. 246, No. 10 118

James, Kay:
  - Testimony 90
  - Effects of Restricting Funds for Abortion—Texas, from Morbidity and Mortality Weekly Report, June 6, 1980, vol. 29, No. 22 96
  - Prepared statement 102

Leland, Hon. Mickey: Testimony 87

Masterson, Byron J.:
  - Testimony 150
  - Prepared statement 154

Packwood, Hon. Bob: Testimony 83

Rosenblum, Victor G.:
  - Testimony 10
  - Prepared statement 16

Simmons, Althea T.L.:
  - Testimony 73
  - Prepared statement 75

Taylor, William L.: Testimony 122

APPENDIX

Statement of Lois C. Waldman, acting director, Commission on Law and Social Action, American Jewish Congress 159

ABORTION FUNDING RESTRICTION ACT

TUESDAY, APRIL 2, 1985

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, DC.

The subcommittee met at 9:35 a.m., pursuant to notice, in room 430, Dirksen Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum, DeConcini, McConnell, and Denton.

Staff present: Stephen J. Markman, chief counsel and staff director; Randall R. Rader, general counsel; Susan Bourne, clerk; and Diane Stark, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator **Hatch**. The hearing will come to order.

In his State of the Union Address earlier this year, President Ronald Reagan noted that:

> The question of abortion grips our Nation. Abortion is either the taking of a human life or it isn't. And if it is—and medical technology is increasingly showing that it is—it must be stopped. It is a terrible irony that, while some turn to abortion, so many others who cannot become parents cry out for children to adopt. We have room for these children; we can fill the cradles of those who want a child to love. And tonight, I ask you in Congress to move this year on legislation to protect the unborn."

In response to this timely plea, the Senate Judiciary Committee today begins hearings on S. 522, the Abortion Funding Restriction Act, which does not fulfill the President's objective of stopping abortion entirely, but at least takes the initial step of ensuring that Federal tax dollars are not used to terminate fetal lives.

A ban on the use of Federal funds to perform abortion is far from a new concept. Indeed, the operative language of this proposal is virtually identical to the Hyde amendment which was first attached to the Health, Education, and Welfare Department appropriations bill in 1976 and declared constitutional by the Supreme Court in the 1980 *Harris* v. *McRae* case. Nonetheless, it would be significant for Congress to state permanently and unequivocally that it will not lend financial assistance to a practice that the President notes may well be "the taking of a human life."

Title VI of the Civil Rights Act of 1964 is a very appropriate vehicle to make the Hyde amendment permanent. Senator Pastore, the chief spokesman for title VI, explained a key purpose for its adoption during the Senate debates leading to its approval:

> Title VI would avoid the recurrence of acrimonious debate in the Congress as to discrimination in discussing individual federal aid programs. Time and time again, such proposed legislation has come before this body. . . It is to avoid such a situation that Title VI would constitute as permanent policy of the U.S. Government the principle that discrimination will not be tolerated. Thus, title VI would eliminate all the confusion and discussion that arise every time a grant bill comes before the Senate.

Title VI was enacted to make permanent an effective and potent enforcement mechanism and thus to avoid the numerous debates necessary to make nondiscrimination policy a part of every Federal financial program or activity. Making the Hyde amendment permanent faces the same obstacles that made adoption of title VI expedient.

According to a Congressional Research Service study quoting the Alan Guttmacher Institute, which I will make part of this record, seven current Federal programs could potentially finance the performance of abortions. Five of these programs are currently covered by the Hyde amendment, the other two—military hospitals and the CHAMPUS program—are within the appropriations for the Department of Defense which also enforces a Hyde amendment policy by regulation.

S. 522, therefore, would not effect any change in current abortion funding policy, but it would make that policy permanent in an effective and potent manner without seven separate amendments to authorizing legislation. Title VI was originally enacted for that purpose and should again serve masterfully as Senator Pastore and its other authors intended.

In conclusion, I would like to comment on one further aspect of title VI well-suited to making the Hyde Amendment permanent. The Hyde amendment only applies to Federal funds appropriated under the Health and Human Services bill and places no restrictions on private activities within health facilities nor on Federal programs outside the sweep of the appropriated funds. Title VI carries a program or activity limitation. Senator Pastore stated the purpose of this legislation during the 1963 debates:

> Title VI's requirements must relate directly to the particular program or activity against which they are imposed. Participation in one program would not justify the exaction of a * * * assurance concerning some other program * * *. Only the program in which a violation has occurred would be affected by title VI * * *. There is no intent, no motive, no idea of spreading the tentacles of the Federal Government to choke off all State activity. Not at all.

This was echoed by chief sponsor Congressman Celler in the House: "Its application is confined to programs and activities which receive Federal financial assistance." This limitation, further supported by Senator Ribicoff and others in the Senate and recently upheld by the Supreme Court in the case of *Grove City* v. *Bell*, means that S. 522 will not extend beyond programs and activities used to fund abortions.

As I mentioned earlier, CRS and the Guttmacher Institute could find only seven such programs. S. 522 will not apply to hospital construction, counseling, or referal programs, or to any privately funded hospital activities. These programs are outside the language of S. 522 because they are not used to perform abortions. Thus, title

VI serves well to make the Hyde amendment prohibitions permanent.

The committee looks forward to exploring S. 522 and invites groups, whose views may not be represented by today's witnesses, to write the committee which will see that those perspectives are made part of the record.

[The text of S. 522 follows:]

II

99TH CONGRESS
1ST SESSION

S. 522

To amend the Civil Rights Act of 1964 to protect the rights of the unborn.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 27 (legislative day, FEBRUARY 18), 1985

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Civil Rights Act of 1964 to protect the rights of the unborn.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) is amended by adding at the end thereof the following:

"SEC. 606. Nothing contained in the Civil Rights Act of 1964 shall be construed to authorize the use of Federal financial assistance for abortions and no such assistance shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.".

○

Senate **Hatch**. Senator Metzenbaum, we are happy to have you with us today and we will turn to you at this point.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator **Metzenbaum**. Thank you, Mr. Chairman.

Mr. Chairman, one of the tragic developments in our country over the last few years is the growing feeling of some groups in our society that they have the right to impose their personal religious views on everybody else.

The issue of abortion is an extremely complex and emotional one. Serious and thoughtful scholars and theologians take fundamentally different positions about it. The fact that deeply held views of our moral and religious leaders are in such fundamental disagreement convinces me that the Government is not going to resolve this disagreement nor should it be in the business of imposing the moral or religious views of one group on another.

This consideration, more than any other, leads me to oppose efforts to interfere with the freedom of a woman to make this very personal decision. This is basically the position the Supreme Court has taken in interpreting the constitutional right to privacy in this matter.

We are here today to discuss yet another attempt to inject government into this area of personal choice. Your bill, Mr. Chairman, would amend title VI of the Civil Rights Act of 1964 to create civil rights for the unborn and to permanently prohibit the use of any Federal funds for abortion services unless the life of the mother is threatened.

This bill would make permanent one of the most unfair and discriminatory provisions that this Congress has ever adopted, the so-called Hyde amendment. Each year for the past several years Congress has added a rider to appropriations bills prohibiting Federal funds from being spent for abortion. This limitation means that poor women who receive their medical services through medicaid are denied access to a doctor to perform an abortion. While upper class and middle class women are able to exercise their constitutional rights, poor women cannot.

Mr. Chairman, I think that one of the most significant aspects of this entire issue is the cleavage, between the affluent and those who are not able to afford an abortion on their own, that we cause by this kind of legislation.

Neither you nor any other person will be able to keep an abortion from being performed if someone with funds choose to have one. So all we are really disputing relates to the rights or the lack of rights of the very poor or those who cannot afford to have an abortion unless the Government provides the funding.

We are not going to reduce abortion nationwide. This type of legislation only reduces abortion in the very poorest areas of the country with respect to the impoverished of the country. It does not do anything to affect the rights of those who have the funds to have an abortion performed.

I have no doubt that because of the Hyde amendment poor women have been driven back to dangerous back alley abortions, just as they were in the days before the Supreme Court held that a woman had a right to make a personal choice about abortion.

Under the Hyde amendment, even young women who are pregnant because they have been raped or because of incest are denied access to an abortion. I look to the day when this country will return to its senses and we will be able to keep this kind of an outrageous amendment from being attached to appropriations bills.

In the meantime, it is extremely important that we not allow this limitation to become part of permanent law. As a matter of fact, I should point out, Mr. Chairman, that I believe that your bill is much worse than the Hyde amendment. Not only does it make the Hyde amendment permanent, it represents an attempt to amend the Constitution through the backdoor of legislation and it distorts the intention and meaning of civil rights laws.

What does it mean to create civil rights for the unborn? Does it mean that a woman has no right to an abortion even in the first week after pregnancy? How do we balance her rights against the civil rights of the fetus? And if we cannot say that her rights outweigh the rights of the fetus, is not the result totally inconsistent with the Supreme Court's interpretation of the Constitution? If the fetus has civil rights, how do we justify an abortion even if it is necessary to save the life of the mother? Is the use of contraceptives that work after conception murder? What is the effect of this proposal on the careful balancing test the Supreme Court has set out in stating when and under what circumstances State laws can restrict abortions?

This bill raises an extraordinary number of complex and frightening questions. Finally, we should recognize that the most important civil rights goal of Congress this year is to reverse the Supreme Court decision in the *Grove City* case. This bill would add new restrictive provisions on the use of Federal funds to one of the four major bills that we must amend this year in order to achieve that objective.

Consequently, it threatens to prolong and complicate the debate over the *Grove City* issue by adding to it a divisive and emotional fight over abortion. I am anxious to hear testimony on this bill. I will not be able to remain present by reason of another hearing at 10:00 o'clock that I am going to have to attend, but I expect to read the statements of those who are testifying today.

But without having heard the statements, I have no reservations in saying, Mr. Chairman, that I think this is a bad bill and one that I will strongly oppose. But having said that, let me say that there is one positive aspect of this matter to which I would like to address myself, and that is that year after year after year after year we have dealt with this issue as an amendment to some other very much needed piece of legislation. At least in this instance you have brought to us a bill that we can deal with on its own and look at it as a separate piece of legislation.

Having said that, let me say that, knowing what the bill contains, I think the sooner we defeat it the better off we will be. But I am glad that at least you have made the issue simple and direct and have brought it to us in that manner and I know that you will work assiduously to pass this legislation and, as has been the case in so many other instances in some of our differing views, I will work equally assiduously to attempt to defeat it.

Senator **Hatch**. Of that I have no doubt, Senator.

Senator DeConcini.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator **DeConcini**. Mr. Chairman, thank you. In listening to my distinguished colleague from Ohio, I appreciate and respect his position on this issue, as I respect others who happen to disagree with my opinion, the opinion of the chairman, or others.

I think it is important for us to continue to address this issue. The Senator from Utah has steadfastly brought it before this body and rightfully so. We hear so many speak eloquently and the Senator from Ohio is certainly one of those in behalf of individuals' human rights, the right to be free, the right not to have discrimination, and the right to preserve life. We just disagree on where life is. It is so clear to this Senator that if you really want to preserve and promote the values that this country has proudly done so in the past, although maybe sometimes reluctantly sometimes only with years and years of preparation and persistence, that this issue has to be pressed.

We are dealing with life. Yet there is acceptance by many to ignore that fact and to permit the taking of that life. In this case that life has done nothing offensive and has not had an opportunity to decide wether or not to live within the bounds of our society. The life just happens to be there and, with the election of one or two people, it has been and can be terminated.

The use of public funds for abortions is abhorrent to me. I think the Congress of the United States has time and time again ruled that that expenditure is not in the public interest, though we have not yet passed the constitutional amendment which would forbid that.

It is my hope, Mr. Chairman, that your steadfastness in this area, your willingness to work with various groups, your impartial dealings with the witnesses that appear before us will continue so that no one can say that their opinions have not yet been heard. I have every reason to believe that you will. To my friend from Ohio, again, I respect his strong beliefs with regard to the position that he has steadfastly taken, as I know he appreciates and respects ours.

It is interesting to note that since the Supreme Court decision there has been literally a 10-percent or more increase in abortions. That is over 1 million known abortions committed previously that had not been committed before. There are probably many, many more that are unreported, and this certainly leads this Senator to the conclusion that that decision has not improved the quality of life. In fact it has extinguished not only the quality of unborn people but absolutely eliminated them from any rights that they might have had under our system of law.

I realize that this battle and the effort to change the law is not going to be an easy one. We will continue to argue about it, philosophize, and struggle in our minds and in our own conscience.

I compliment the Senator from Utah for again pursuing this. After many years of working with him, I know of the political liabilities associated with his position. The political gains are minimal in my judgment. However, it is something that we cannot ignore and I look forward to working with him in this committee on this effort.

Thank you, Mr. Chairman.

Senator **Hatch**. I want to thank you, Senator DeConcini, for your kind remarks.

We are very delighted to have four excellent witnesses on this subject here today. Profs. Victor Rosenblum, Norman Dorsen, and Robert A. Destro, and the director of the Washington Bureau of the NAACP, Althea Simmons. We look forward to taking the testimony of all four of you and listening very carefully to what you have to say.

We will begin with you, Professor Rosenblum.

I ask unanimous consent that a document entitled "State Restrictions on Abortion Funding" be included in the record at this point.

[The document referred to follows:]

STATE RESTRICTIONS ON ABORTION FUNDING

Since 1981, federal policy has been to use public funds for abortion only when the mother's life would be endangered if the pregnancy were carried to term. Most states also follow this policy (denoted by the word "Life" in the following list).

Eight state legislatures have decided to fund elective abortion; another five are forced to do so by court rulings in which funding restrictions were held to violate certain provisions of the state constitution; and one state legislature has repeatedly voted to restrict funding but has been overruled by the governor's veto.

In one state, Colorado, the legislature has favored abortion funding but has now been overruled by the voters themselves. On Nov. 6, 1984, the state constitution was amended by popular referendum to ban all direct or indirect subsidies for abortion, except that the legislature may vote to fund procedures necessary to save the life of either mother or child when reasonable efforts have been made to save both.

The dates in parentheses indicate the year when the current funding restrictions in a state were first enacted. This information is current as of Dec. 7, 1984.

Alabama: Life (1981)
Alaska: Elective
Arizona: Life (1980)
Arkansas: Life (1981)
California: Elective (court order)
Colorado: Life (referendum, 1984)
Connecticut: Elective (court order)
Delaware: Life (1981)
District of Columbia: Elective
Florida: Life (1981)
Georgia: Life (1981)
Hawaii: Elective
[illegible]
Idaho: Life (1981)
Illinois: Life (1980)
Indiana: Life (1979)
Iowa: Life, rape/incest, fetal deformity (1980)
Kansas: Life (1981)
Kentucky: Life (1977)
Louisiana: Life (1982)
Maine: Life (1980)
Maryland: Life, rape/incest, substantial mental health risk (1980)
Massachusetts: Elective (court order)
Michigan: Elective (by governor's veto of stricter – life only – policy)
Minnesota: Life, rape/incest (1980)
Mississippi: Life (1981)
Missouri: Life (1981)
Montana: Life (1980)
Nebraska: Life (1982)
Nevada: Life (1981)
New Hampshire: Life (1981)
New Jersey: Elective (court order)
New Mexico: Life (1980)
New York: Elective
North Carolina: Elective
North Dakota: Life (1977)
Ohio: Life (1981)
Oklahoma: Life (1981)
Oregon: Elective
Pennsylvania: Life, rape/incest (1980)
Rhode Island: Life (1977)
[illegible]
South Carolina: Life (1981)
South Dakota: Life (1978)
Tennessee: Life, rape/incest (1981)
Texas: Life (1981)
Utah: Life (1982)
Vermont: Elective (court order)
Virginia: Life, rape/incest, fetal deformity (1982)
Washington: Elective
West Virginia: Elective
Wisconsin: Life, rape/incest, severe health damage (1977)
Wyoming: Life, rape/incest (1982)

Summary

States which fund for:	
Life of the mother only	29
Life, rape/incest	4
Other exceptions	4
Elective (legislative)	8
Elective (governor's veto)	1
Elective (court order*)	5
Total	51**

* In Connecticut and Vermont, the ruling is not by the state supreme court and so is subject to appeal.

** Includes District of Columbia.

By Richard Doerflinger. Compiled Dec. 7, 1984, and reprinted here from Respect Life Report, *an NCCB publication, Washington, D.C., Vol. 7, No. 8, p. 2*

Senator **HATCH**. Now, this document points out that 29 States bar use of State funds to perform abortions except when the mother's life is endangered. Four more States contain similar language but add rape and incest to the exceptions clauses. Four more States include other exceptions such as fetal deformity. Thirteen States and the District of Columbia permit use of State funds for abortions. Five of those thirteen States were required by court rulings to permit use of State funds for abortions.

Now, our first witness, Prof. Victor Rosenblum, brings outstanding legal credentials to this hearing. Professor Rosenblum is a professor of law at the Northwestern University and is vice chairman of Americans United for Life. In this latter capacity, he had the opportunity to present the oral argument before the Supreme Court which resulted in the Court upholding the Hyde amendment.

So we welcome you to the committee this morning, Professor Rosenblum and we look forward to taking your testimony and admire you for your astuteness.

STATEMENT OF VICTOR G. ROSENBLUM, PROFESSOR OF LAW AND POLITICAL SCIENCE, NORTHWESTERN UNIVERSITY

Mr. **ROSENBLUM**. Thank you, Mr. Chairman. I appreciate the opportunity to appear before this distinguished committee as a member of——

Senator **HATCH**. If I can interrupt you for 1 second, I think what we will do is we will proceed to hear from all the witnesses, and then we will ask questions and we will use the 10-minute rule so that we can all ask any questions we like.

Go ahead. I am sorry to interrupt you.

Mr. **ROSENBLUM**. I appreciate the opportunity to appear before this distinguished committee as a member of this distinguished panel to testify concerning the desirability and legal effect of S. 522, the Abortion Funding Restriction Act.

Ours is a soceity which has achieved its unity out of diversity and I am sure we will have a diversity of views presented today by the panel as we have by the distinguished members of the committee.

For identification purposes, I have been a professor of law and political science at Northwestern University in Illinois for some 25 years. It should be made clear that none of the views I expound here are expressed on behalf of or under the auspices of the university.

As I remarked when testifying previously before the Subcommittee on the Constitution, I take pride in being a lifelong Democrat who has tried to devote a portion of my legal and political energies to the causes of the disadvantaged and the disenfranchised within our society—the poor, the handicapped and the victims of prejudice in many forms.

My concern for the unborn is an outgrowth of this commitment. The mark of a humane society is, in my view, the attention to the protection of the weak, the dependent, the helpless, the victims of discrimination.

It is for these reasons that I applaud the introduction of S. 522, to establish within the Civil Rights Act of 1964 a permanent and comprehensive ban on the use of Federal financial assistance for the performance of abortions, except where the life of the mother would be endangered if the fetus were carried to term.

Passage of S. 522 will confirm a national policy that has existed since 1977 with the annual passage of the Hyde amendment by both Houses of Congress, and broaden its application to all programs of Federal financial assistance. This national policy is a simple one, to affirm the value of human life and the preference for childbirth over abortion by declining to fund abortions except in very narrow circumstances.

The interests to be served by enacting this policy into the permanent corpus of Federal statutory law are numerous. Most prominent from the viewpoint of Senators and Members of Congress is an end to the annual floor debates over the issue of abortion funding. Equally important is the virtue of certainty and predictability. By establishing a single standard for the small category of abortions which may be paid for by Federal funds, S. 522 will bring to an end the occasional changes in that standard and produce a uniform Federal policy to fund abortions only when necessary to preserve maternal life.

But the most compelling reason is to recognize the abortion issue for what it is—an issue of civil rights for unborn Americans. Enactment of S. 522 will for the first time bring the protection of the unborn within the rightful purview of the Federal civil rights laws. Those of us who have advocated the rights of the unborn have long known the facts of human fetal development which are at last receiving widespread national attention through ultrasound films and other techniques.

We welcome this enhanced capacity to recognize the humanity of the unborn and believe that it can build a legal and social consensus that holds high as possible regard both for the inalienable rights of the unborn and the needs of pregnant women.

The purpose of my testimony this morning is to discuss briefly the constitutionality of S. 522 and the desirability of enacting a permanent ban on the funding of abortion as part of the Civil Rights Act of 1964.

Five years ago, as you graciously noted, Senator, I had the privilege of being involved in the abortion funding cases before the Supreme Court, in *Harris* v. *McRae* and *Williams* v. *Zbaraz*. In those cases, the Supreme Court upheld the constitutionality of Federal and State restrictions on the funding of abortion through the Medicaid Program.

The varied enactments of the Hyde amendment since 1977 have restricted the use of moneys under title VIV of the Social Security Act—the Federal component of the Medicaid Program—for abortion funding. States, which bear the heavier burden of Medicaid appropriation, have followed suit in large number. Today, three-fourths of the States deny Medicaid funding for most abortions, a practice which was specifically upheld in *Williams* v. *Zbaraz*.

S. 522 seeks to enact an abortion funding ban that is identical to the Hyde amendment in all respects but two. First, it is permanent; and, second, it applies to all programs of Federal financial assistance.

Congressman Hyde and supporters of the Hyde amendment liberated prolife Americans from the onus of supporting abortion with their dollars at the same time that they were speaking out against abortion with their voices. As humane and vital as the Hyde amendment was and is, it suffers from its limited life span and the necessity for repassage with each Congress.

S. 522 will make the funding ban permanent. It will also provide comprehensive coverage insofar as Federal funding of the performance of abortions is concerned. Without such comprehensive coverage, the issue of abortion funding may have to be raised in each and every future debate over Federal appropriations to existing health related programs other than Medicaid as well as over the creation of new Federal health programs.

To limit an abortion funding ban to the Medicaid Program allows, if it does not invite varying disparate resolution of abortion funding issues in various government entitlement programs.

The rulings in the *Harris* and *Williams* cases have foreclosed debate as to whether such a limitation is constitutional. The Court declared that the limitation is constitutional. The Hyde amendment, which has been passed each year since 1977, is part of the appropriations act, prohibited the use of any Federal funds to reimburse the cost of abortions performed under the Medicaid Program except under certain specified circumstances. The most restrictive version had an exception for abortions necessary to save the life of the mother; other years included exceptions for rape and incest, and severe and long-lasting damage to the mother's physical health.

The Supreme Court concluded that a woman's right to privacy that includes the freedom to choose abortion asserted in *Roe* v. *Wade* does not carry with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Denial of Medicaid reimbursement, even for so-called medically necessary abortions, was not a governmentally created obstacle in the woman's path.

The Court held that the policy of favoring childbirth over abortion by funding childbirth and not abortion procedures does not impinge on the right to privacy or on any other constitutional right such as the first amendment's establishment clause.

The Hyde amendment did not and S. 522 does not discriminate based on any suspect classification such as race, color, or national origin, since it does not impinge on any fundamental right and does not discriminate against any suspect class. The Abortion Funding Restriction Act is valid as a rational means of achieving an important governmental objective.

Open debate, such as that being heard today, is the most appropriate means of balancing the State's interest in fetal life and maternal health. And this is the proper forum for that determination: "Whether freedom of choice that is constitutionally protected warrants Federal subsidization is a question for Congress to answer."

Resolution of conflict between the mother's abortion choice and the civil rights of the unborn are peculiarly within the province of congressional debate. Even the Justices have reminded us that "Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

The Supreme Court made clear that a State or city pursuant to democratic processes may express a preference for childbirth. The policy choice made by Congress that is embodied in S. 522 is plainly constitutional.

Although *Harris* and *Williams* cases concerned funding for title XIX programs, there is no distinction of constitutional significance between the scope of the Hyde amendment and the broader scope of S. 522. The same fundamental principle applies; the Federal Government is no more obligated to subsidize a woman's exercise of her right to privacy under programs other than Medicaid than it is under title XIX. This is underscored by the fact that the Supreme Court has upheld restrictions on public funding for abortions in programs other than Medicaid. In *Poelker* v. *Doe*, for example, the Court upheld a policy of the city of St. Louis to provide publicly financed hospital services for childbirth but not for nontherapeutic abortions. The Court held that "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth, as St. Louis has done."

S. 522 simply established a permanent and comprehensive policy of favoring childbirth over abortion in Government funding programs. It penalizes no institution or program which chooses to subsidize abortions with money from other than Federal sources, and it creates no obstacle to the exercise of any woman's constitutional rights. Accordingly, S. 522 is a plainly constitutional use of the appropriations power to protect important interests of American society.

The Civil Rights Act of 1964 is a milestone in the progress of American society and Government toward fulfilling the American promise of justice for all citizens. Few pieces of legislation in this century engendered more thorough debate, but few have touched so critically upon the premises which lie at the root of our national history and purpose. As Senator Eugene McCarthy said on the floor of the Senate, minutes before the historic vote approving the Act:

> All of these rights to which we now refer today, on another occasion were declared to be the inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human rights civil rights, and we have sought to protect them through the Constitution of the United States and the laws of the land.

The issue of abortion touches no less deeply upon the basic premises of American justice. The issue of civil rights for the unborn is unquestionably one of great contention in our society. Some would deny all legal protection to the unborn and urge this Chamber to subsidize abortions in the interests of women. Many others, millions of Americans from all religions and all walks of life, disagree. The intensity of this debate may be compared to those concerning the civil rights of blacks in the 19th century, when the issue was slavery, or the 20th century, when the issues were discrimination and segregation.

The fact that a right to abortion is held to be protected under the Constitution does not alter, even marginally, the biological facts and social commitment which lead Americans, including the incumbent President, to campaign for greater legal protection for the unborn. Neither did the infamous *Dred Scott* decision in 1857 alter to any degree the humanity or innate dignity of that class of persons which the Supreme Court relegated to the status of chattel.

The Supreme Court has ruled from 1973 up to now at least that the Government is restricted in its ability to forbid and to regulate the practice of abortion because of the right to privacy. However, even these interpretations of the right to privacy over the past 12 years have made clear that the Government is under no obligation to subsidize the practice of abortion.

There is no more appropriate manner to effectuate this policy than through the Civil Rights Act of 1964. Like the Civil Rights Act itself, S. 522 may be an imperfect solution to a deep-seated injustice in American society. However, the Civil Rights Act, as amended by S. 522, will be a more perfect instrument of civil rights, for it will provide a beacon of leadership and hope for the eventual recognition that the personal and social problems that lead to abortion must be addressed in ways other than the destruction of unborn humanity. Four thousand unborn children die each day through abortion. This is a compelling issue of civil rights entitled to the vision, courage, and imagination which led to the enactment by Congress of the Civil Rights Act just a generation ago.

Objections will undoubtedly be raised that S. 522 expands Federal power into areas of allegedly private concern and that the issue of abortion is a "trumped-up" issue of civil rights.

Not surprisingly, the same objections were raised in the 1964 act and were directed especially at title VI of the act. The minority report of the Committee on the Judiciary of the House of Representatives, for example, at that time excoriated title VI, which declared that discrimination on the ground of race, color, or national origin shall not occur in connection with programs receiving Federal financial assistance. The minority report stated, "Of all the harsh and unprecedented proposals contained in the bill, this title is the most radical departure from proper governmental policy." The dissenters' objection was that title VI made every recipient of Federal funds an agent for enforcing the Government's policies on discrimination, thus effectively amending every Federal statute or Financial Assistance Program.

In his speech to the Senate on June 19, 1964, Senator Everett Dirksen gave the answer to that sort of claim. He spoke about the history of progress in the fulfillment of the great ideals of American democracy, and about how resistance to the efforts to fulfill these ideals had always met the same objection.

At the heart of the progress of humanity, Senator Dirksen noted in the course of his ardent support of the bill, at the heart of the progress of humanity is increased reverence and respect for the value of life itself. "There was a time, he said, when the attributes of life, when life itself * * * did not count too much in the scale of every day values." Senator Dirksen then recounted historical anecdotes—the brutality of Peter the Great, the callousness of Marie Antoinette, the disregard of Marshall Zhukov—and he concluded that "history would not accept" these attitudes, "because the thrust of humankind has been ever forward and upward."

The Civil Rights Act of 1964 should not be narrowly construed to protect only the right to enjoy attributes of life, such as citizenship, employment, education, but must first and foremost protect and enshrine the intrinsic value of life itself.

Who among us, after viewing the stark and accurate portrayal of abortion in Dr. Bernard Nathanson's film, "The Silent Scream," can deny the centrality of abortion on the agenda of civil rights issues in 1985? The Congress has shown its concern for this issue by consistently enacting restrictions on funding of abortion through title XIX of the Social Security Act, the medicaid program, but it has yet to make such a ban permanent.

Congress ought not to be viewed as tentative on the issue of abortion funding, for this issue goes to the heart of congressional authority: The power of appropriations. A Congress which declines systematically and thoroughly to fund abortions and which removes the funding issue from the precarious uncertainty of floor amendments and appropriation riders is a congress that takes a powerful and ennobling step forward in protection of the civil rights of unborn Americans, for it makes clear the nexus between concern for the unborn and civil rights, and in manifesting this choice for the appropriation of tax dollars it identifies Congress firmly and permanently with life's support.

Mr. Chairman, I thank you for your gracious invitation to appear before this committee. I ask that the full text of my remarks be submitted for the record.

Senator HATCH. Thank you, sir. Without objection, so ordered.

[The statement of Mr. Rosenblum follows:]

PREPARED STATEMENT OF VICTOR G. ROSENBLUM

I appreciate the opportunity to appear before this Committee to testify concerning the desirability and legal effect of S.522, the Abortion Funding Restriction Act. Mr. Chairman, I have had the honor of appearing before the Subcommittee on the Constitution to testify regarding S.J. Res. 110, 97th Congress, 1st Session (1981), 1/ and of submitting a prepared statement concerning S.J. Res. 3, 98th Congress, 1st Session (1983). 2/ I welcome the opportunity to address the Committee concerning S. 522, and to submit this written statement for the record.

For identification purposes, I have been a professor of law and political science at Northwestern University in Illinois for some 20 years. (It should be made clear that none of the views I here expound are expressed on behalf of or under the auspices of the University.) My curriculum vitae is appended. I testify on my own personal behalf and in my capacity as Vice-Chairman of Americans United for Life and the AUL Legal Defense Fund, Chicago, Illinois, the only public interest law firm in the nation that devotes its full-time efforts to pro-life matters. It was in this capacity that I had the opportunity to argue orally the case for the Hyde Amendment and similar state abortion funding restrictions before the United States Supreme Court. 3/

As I remarked when testifying before the Subcommittee on the Constitution, I take pride in being a lifelong Democrat who has tried to devote a portion of my legal and political energies to the causes of the disadvantaged and the disenfranchised in our society: the poor, the handicapped, and the victims of prejudice in many forms. My concern for the unborn is an outgrowth of this commitment. The mark of a humane society is, in my view, its attention to the protection of the weak, the dependent, the helpless, the victims of discrimination. The mark of a civilized and liberal nation is not willingness to cast off those who are dependent for their lives and well-being on those of us who are more fortunate, but rather a readiness to share the fruits of our privilege.

It is for these reasons that I applaud the introduction of S.522, to establish within the Civil Rights Act of 1964 a permanent and comprehensive ban on the use of federal financial assistance for abortions, except where the life of the mother would be endangered if the fetus were carried to term. Passage of S.522 will confirm a national policy that has existed since 1977 with the annual passage of the Hyde Amendment by both Houses of Congress, and broaden its application to all programs of federal financial assistance. 4/ This national policy is a simple one: to affirm the value of human life and the preference for childbirth over abortion by declining to fund abortions except in very narrowly proscribed circumstances.

The interests to be served by enacting this policy into the permanent corpus of federal statutory law are numerous. Most prominent from the viewpoint of Senators and Members of Congress is an end to the annual floor debates over the issue of abortion funding. 5/ Equally important is the virtue of certainty and predictability. By establishing a single standard for the small category of abortions which may be paid for by federal funds, S.522 will bring to an end the occasional changes in that standard and produce a uniform federal policy to fund abortions only when necessary to preserve maternal life. But the most compelling reason is to recognize the abortion issue for what it is—an issue of civil rights for unborn Americans. Enactment of S.522 will, for the first time, bring the protection of the unborn within the rightful purview of the federal civil rights laws. Those of us who have advocated the rights of the unborn have long known the facts of human fetal development which are, only now, receiving widespread national attention through real-time ultrasound films and other techniques. Nevertheless, we welcome this newly-found recognition of the humanity of the unborn, and believe that it signals a new moment in the national debate over abortion, a new moment which will see a shift in the abortion argument away from fruitless contention over whether the unborn is a human life--without a doubt, it is--and towards the development of a legal and social consensus that holds high regard both for the inalienable rights of the unborn, and the needs of pregnant women.

The purpose of my testimony this morning is to discuss two legal ramifications of S.522: first, the constitutionality of S.522 in light of Supreme Court decisions such as *Harris v. McRae* 6/ and *Maher v. Roe*; 7/ and second, the desirability of enacting a permanent ban on the funding of abortion as part of the Civil Rights Act of 1964. 8/ Opponents of S.522 have raised a number of misplaced arguments that relate to these two legal issues, and in the course of my testimony I will attempt to address these objections.

A. The Constitutionality of S.522

Mr. Chariman, I believe I can speak with some familiarity to the constitutional issues concerning S.522. Five years ago, I served as counsel of record in two cases before the United States Supreme Court on the question of abortion funding: *Harris v. McRae* and *Williams v. Zbaraz*. In those cases, the Supreme Court upheld the constitutionality of federal and state restrictions on the funding of abortion through the Medicaid program.

In order to examine the constitutionality of S.522 in light of *Harris* and *Williams*, there must be a clear understanding of what S.522 is designed to accomplish. The varied enactments of the Hyde Amendment since 1977 has restricted the use of monies under Title XIX of the Social Security Act 9/ -- the federal component of the Medicaid program--for abortion funding. States, which bear the heavier burden of Medicaid appropriation, have followed suit in large number. Today, three-fourths of the states deny Medicaid funding for most abortions, a practice which was specifically upheld in *Williams v. Zbaraz*.

S.522 seeks to enact an abortion funding ban that is identical to the Hyde Amendment in all respects but two: First, it is permanent, and second, it applies to all programs of federal financial assistance. The virtues of making the funding ban permanent have already been discussed. The necessity of making the funding ban applicable to all disbursements of federal funds derives from the very same principles: Without such comprehensive coverage, the issue of abortion funding may be raised in each future debate on federal appropriations to existing health-related programs other than Medicaid, as well as during the creation of new federal health programs. To limit an abortion funding ban to the Medicaid program would leave the issue of abortion funding open to disparate resolution in various government entitlement programs, and thus subvert the intent of this legislation to enact an across-the-board limitation of federal subsidies for the performance of abortions.

Mr. Chairman, the rulings in *Harris* and *Williams* have foreclosed debate as to whether such a limitation is constitutional. The Hyde Amendment, which has been passed each year since 1976 as part of the Appropriations Act, prohibited the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. The most restrictive version had an exception for abortions necessary to save the life of the mother; other years included exceptions for rape and incest, and severe and long-lasting damage to the mother's physical health.

The Court concluded that the freedom to choose abortion recognized in *Roe v. Wade* "does not carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." 10/ Denial of Medicaid reimbursement, even for medically necessary abortions, 11/ was not a governmentally-created obstacle in the woman's path. Rather, the "financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." 12/ The policy of favoring childbirth over abortion by funding childbirth and not abortion procedures does not affect any other constitutional rights, such as those guaranteed by the First Amendment's Establishment Clause.

Since it does not impinge on any fundamental right or liberty, the Abortion Funding Restriction Act is valid as a rational means of achieving an important governmental objective. It does not unconstitutionally discriminate against any "suspect class." The Supreme Court "has repeatedly held that poverty, standing alone, is not a suspect classification." 13/ The Hyde Amendment did not, and S.522 does not, discriminate based on any suspect classification, such as race, color or national origin.

The policy underlying the Hyde Amendment's restriction on Title XIX Medical funds applies with equal force to the use of federal funds in other programs. The bill being debated here does not discriminate on the basis of race, color or national origin. It simply ensures that the constitutionally permitted policy of favoring abortion over childbirth is uniformly applied throughout federal programs.

Open debate, such as that being heard today, is the most appropriate means of balancing the state's interest in fetal life and maternal health. And this is the proper forum for that determination: "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer." 14/ Resolution of conflict between the mother's abortion choice and the civil rights of the unborn are peculiarly within the province of Congressional debate. "[W]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortion, the appropriate forum for their restriction in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." 15/ The policy choice made by Congress as embodied in S.522 is plainly constitutional. The Supreme Court firmly stated that "a State or city, pursuant to democratic processes, [may express] a preference for normal childbirth." 16/

Although Harris and Williams concerned funding for Title XIX programs, there is no distinction of constitutional significance between the scope of the Hyde Amendment and the broader scope of S.522. The same fundamental principle applies; the federal government is no more obligated to subsidize a woman's exercise of her right to choose abortion under programs other than Medicaid than it is under Title XIX. This is underscored by the fact that the Supreme Court has upheld restrictions on public funding for abortions in programs other than Medicaid. In Poelker v. Doe, the Court upheld a policy of the city of St. Louis to provide publicly financed hospital services for childbirth but not for nontherapeutic abortions. 17/ The Court held that "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth, as St. Louis has done." 18/

S.522 simply establishes a permanent and comprehensive policy of favoring childbirth over abortion in government funding programs. It penalizes no institution or program which chooses to subsidize abortions with money from other than federal sources, and it creates no obstacle to the exercise of any woman's constitutional rights. Accordingly, S.522 is a plainly constitutional use of the appropriations power to protect important interests of American society.

B. S. 522 and Title VI of the Civil Rights Act of 1964

Mr. Chairman, the Civil Rights Act of 1964 is a milestone in the progress of American society and government towards fulfilling the American promise of justice for all citizens. Few pieces of legislation in this century engendered more thorough debate, but few have touched so critically upon the premises which lie at the root of our national history and purpose. As Senator Eugene McCarthy said on the floor of the Senate, minutes before the historic vote approving the Act,

> All of these rights to which we now refer today, on another occasion were declared to be the inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human rights civil rights, and we have sought to protect them through the Constitution of the United States and the laws of the land. 19/

The issue of abortion touches no less deeply upon the basic premises of American justice. The issue of civil rights for the unborn is unquestionably one of great contention in our society. Some would deny all legal protection to the unborn and urge this chamber to subsidize abortions in the interests of women. Many others, millions of Americans from all religions and all walks of life, disagree. The intensity of this debate may be compared to those concerning the civil rights of blacks in the nineteenth century, when the issue was slavery, or the twentieth century, when the issues were discrimination and segregation. The fact that a right to abortion is held to be protected under the Constitution does not alter, even marginally, the biological facts and social commitment which lead Americans, including the incumbent President, to camapign for greater legal protection for the unborn. Neither did the infamous Dred Scott decision of 1857 alter to any degree the humanity or innate dignity of that class of persons which the Supreme Court relegated to the status of chattel. 20/

The government is restricted in its ability to regulate the practice of abortion, just as it is limited in its capacity to regulate the private discriminatory conduct of individuals and institutions. However, the government is under no obligation, as is clearly stated in Harris, Williams, Maher and Poelker, to subsidize the practice of abortion. There is no more appropriate manner to effectuate this policy than through the Civil Rights Act of 1964. Like the Civil Rights Act itself, S.522 is an imperfect solution to a deep-seated injustice in American society. However, the Civil Rights Act as amended by S.522 will be a more perfect instrument of civil rights, for it will provide a beacon of leadership and hope for the eventual recognition that the personal and social problems that lead to abortion must be addressed in ways other than the destruction of unborn humanity. Four thousand unborn children die each day through abortion; if this is not recognized as an issue of civil rights, I fear we have lost the vision, courage and imagination which led to enactment of the Civil Rights Act just a generation ago.

Objections will undoubtedly be raised that S. 522 improperly expands federal power into areas that are of private concern, and that the issue of abortion is a "trumped-up" issue of civil rights. Not surprisingly, the same objections were raised to the 1964 Act, and were directed especially at Title VI of the Act. The Minority Report of the Committee on the Judiciary of the House of Representatives excoriated Title VI, which declared that discrimination on the ground of race, color or national origin shall not occur in connection with programs receiving federal financial assistance. The Minority Report states: "Of all the harsh and unprecedented proposals contained in the bill, this title is the most radical departure from proper governmental policy. 21/ The dissenters' objection was that Title VI made every recipient of federal funds an agent for enforcing the government's policies on discrimination, thus effectively amending every Federal statute or financial assistance program.

In his speech to the Senate on June 19, 1964, Senator Everett Dirksen gave the answer to that sort of claim. He spoke about the history of progress in the fulfillment of great ideals of American democracy, and about how resistance to the efforts to fulfill these ideals had always met the same objection. He spoke of the original Pure Food, Drug and Cosmetic Act of 1906. "The speeches that were delivered about the intrusion of Federal power sound absolutely incredible today when we undertake to re-read them." He spoke about the Social Security Act of 1934. "I remember the fulminations, the castigations and the averments that the Act was unconstitutional." He spoke about the minimum wage. "I had my fingers crossed about it many times." Senator Dirksen continued, "no matter what statements may be made . . . , no matter what the resistance of people who do not wish to change, it will not be denied. Mankind ever forward goes. There have been fulminations to impede, but they have never stopped that thrust . . . [T]here was latitude enough in . . . the oldest written constitution on the face of the earth to embrace within its four corners these advances for human brotherhood." 22/

At the heart of the progress of humanity, Senator Dirksen noted, however, is increased reverence and respect for the value of life itself. "There was a time when the attributes of life, when life itself . . .. did not count too much in the scale of every day values." He then recounted historical anecdotes--the brutality of Peter the Great, the callousness of Marie Antoinette, the disregard of Marshall Zhukov--and concluded that "history would not accept" these attitudes, "because the thrust of humankind has been ever forward and upward." 23/

The Civil Rights Act of 1964, then, cannot be narrowly construed to protect only the right to enjoy the attributes of life--citizenship, employment, education--but must first and foremost protect and enshrine the intrinsic value of life itself.

Indeed, who among us, after viewing the stark and accurate portrayal of abortion in Dr. Bernard Nathanson's film, *The Silent Scream*, can deny the centrality of abortion on the agenda of civil rights issues in 1985? The Congress has shown its concern for this issue by consistently enacting restrictions on funding of abortion through Title XIX of the Social Security Act, the Medicaid program, but it has yet to make such a ban permanent. Congress ought not to be viewed as tentative on the issue of abortion funding, for this issue goes to the heart of Congressional authority: the power of appropriations. A Congress which chooses to fund abortions, or which leaves the decision to withdraw funding to the precarious cauldron of floor amendments and appropriation riders, has failed to take the first step necessary to protect the civil rights of unborn Americans.

NOTES

1. *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. 19, and S.J. Res. 110 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Congress, 1st Session (1981) (statement of Victor G. Rosenblum, Professor of Law, Northwestern University).

2. *Legal Ramifications of the Human Life Amendment Hearings on S.J. Res. 3 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 98th Cong., 1st Session (1983) (statement of Victor G. Rosenblum, Professor of Law, Northwestern University).

3. Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U..S. 297 (1980).

4. A comprehensive list of those programs, institutions and agencies that would be affected by this amendment to Title VI is found at 45 C.F.R. Part 80, App. A.

5. The Hyde Amendment has been the subject of extremely protracted and heated debate in Congress. In 1977-1979 alone, over 40 legislative days on the floor of the House of Representatives and the Senate were devoted to debates concerning the Hyde Amendment. Harris v. McRae, 448 U.S. 297 (1980), Brief of Intervening Defendants-Appellees Buckley, et al., at 29, n.4.

6. 448 U.S. 297 (1980).

7. 432 U.S. 464 (1977).

8. 42 U.S.C. §2000d et seq. (1976).

9. 42 U.S.C. §1396 et seq. (1976).

10. 448 U.S. at 316.

11. The Supreme Court had previously held that states may encourage childbirth by refusing to fund nontherapeutic abortions. Maher v. Roe, 432 U.S. 464 (1977).

12. 448 U.S. at 316.

13. 448 U.S. at 323.

14. 448 U.S. at 318.

15. Maher v. Roe, 432 U.S. 464, 479-80 (1977), *quoting* Missouri K. & T. Rwy. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.).

16. Poelker v. Doe, 432 U.S. 519, 521 (1977).

17. 432 U.S. 519 (1977).

18. Id. at 521.

19. Remarks of Sen. McCarthy, 110 Cong. Rec. S14506 (June 19, 1964).

20. Dred Scott v. Sanford, 19 Howard 393 (1957).

21. H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2453 (emphasis in original).

22. Statement of Sen. Dirksen, 110 Cong. Rec. S14509, 14509-10 (June 19, 1964).

23. Id.

Senator HATCH. Before proceeding to the next witness, I would, without objection, place in the record a legal memorandum prepared to answer whether medicaid reimbursements are Federal financial assistance to the hospital who provides care for indigents. The memorandum concludes that the money paid by a State Medicaid program to a private hospital is not Federal financial assistance, but compensation for services rendered by the hospital to the indigent. Under S. 522, this means States would be required to attach abortion restrictions to any funds dispersed to hospitals, restricting their use for performing abortions, but the restriction would not apply to the hospital's privately funded activities.

[The memorandum referred to follows:]

MEMORANDUM

TO: David Dean

RE: Baylor University Medical Center
Medicare and Medicaid as Federal Financial Assistance

ISSUE:

Does the receipt of Medicare and Medicaid payments by health care providers constitute "federal financial assistance" so as to bring these entities within the application of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et. seq.; Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §1681 et. seq.; and the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101, et. seq.? (The "Civil Rights Acts")

DISCUSSION:

Initially it is helpful to look at what the practical affect would be of a determination that Medicaid and Medicare payments constitute federal financial assistance ("F.F.A.") to health care providers in regard to the above listed Acts. A determination of this type would greatly expand areas into which the federal government could extend its regulatory arm as a result of the receipt of federal dollars. For example if Medicaid and Medicare payments are F.F.A. in regard to health care providers, then along the same line, food stamps would constitute F.F.A. to grocery stores. This line of reasoning would next lead to the conclusion that the supplier of the grocery store is also a recipient of F.F.A. through the original purchaser's use of food stamps. If the supplier is a "recipient" then so is the producer of the products. This logic would ultimately reach back to the farmer who plants the crops, making him a recipient of F.F.A. through the consumer's purchase with food stamps of his production. Another example is that a person who receives a government salary, such as a serviceman or a Judge, and then pays for hospital treatment with money from his government paycheck would subject the institution to government regulation under the above acts. The theory which these examples demonstrate is that a single dollar from any federal source, regardless of federal purpose, infects an entire institution and subjects it to unlimited investigation and imposition of rules and regulations.

It is clear that such an attenuated connection was not sought by Congress in its definition of F.F.A. Congress did not intend that the receipt of federal funds, regardless of the source and purpose, would constitute assistance, even if the Congressionally stated purpose ended long before. To reason otherwise would disregard Congressional intent, statutory language and reality and would lead to the conclusion that -- once F.F.A., always assistance. This line of reasoning would be a major change from the existing statutory interpretation and case law and would open a true Pandora's box of possibilities where government regulation could be extended.

The Court's opinions in United States v. Baylor University Medical Center, 564 F. Supp. 1495 (N.D. Tex. 1983) and United States v. Baylor University Medical Center (United States Court of Appeals, Fifth Circuit) decided July 19, 1984, although holding otherwise, provide the framework for the following argument that Medicare and Medicaid do not constitute F.F.A. under the existing Civil Rights statutes. These cases address the three areas upon which a determination should be based. The Courts in holding that Medicare and Medicaid constitute F.F.A. within the meaning of Section 504 of the Rehabilitation Act of 1973 (and, thus, also Title VI) based the holding on three grounds: first, the Courts which have dealt with the question have generally regarded Medicare and Medicaid as F.F.A.; second, the legislative history of the Medicare program supports the conclusion that Medicare and Medicaid are included in the meaning of F.F.A.; and third, Medicare and Medicaid do not constitute a "contract of insurance". Each of these conclusions upon which the above Courts based their decisions will here be addressed and refuted. The aforesaid Courts so tacitly adopted the government's infection theory that a dollar received from either Medicare or Medicaid automatically brings every aspect of Baylor University Medical Center's operations under the law's coverage. While a perfunctory reading of the Fifth Circuit panel's opinion would lead one to believe it is well-reasoned and firmly grounded, careful scrutiny reveals that it is seriously flawed.

The many cases relied on in the Fifth Circuit panel's opinion do not directly and authoritatively address the question of whether payments made by Medicare and Medicaid constitute federal financial assistance when they discharge a debt incurred by a patient. The one case which has addressed this in the context of a "health care provider is the District Court's decision in Trageser v. Libbie Rehabilitation Center, Inc., 462 F.Sup. 424 (E.D.Va. 1977) aff'd on other grounds, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947, 99 S.Ct. 2895 (1979). The Baylor case is the first time that a Federal Court of Appeals has faced this issue and there simply is no real precedent on the point of federal financial assistance.

CASE LAW

Initially this section will analyze the cases which have held that Medicare and Medicaid do not constitute F.F.A. Then the analysis will turn to showing why the cases relied upon by the Courts in United States v. Baylor University Medical Center are of poor precedential value and, thus, should be ignored.

In the Court of Appeals' decision of Case v. Weinberger, 523 F. 2d 602 (2d Cir. 1975) the Court was faced with the issue of whether a nursing home was entitled to a hearing before their Medicaid payments were terminated. Eighteen (18) of the twenty-one (21) patients in the nursing home were having their bills paid by Medicaid. As a result the owner of the nursing home was seeking a hearing in order to stop the removal of these patients from her nursing home in order to avoid the adverse business consequences. The Court responded to this by stating:

> ". . . a nursing facility's 'need' for patients has nothing to do with the statutory benefits structure. The facility's need is incidential. That a particular nursing facility cannot survive without Medicaid participation was certainly not Congress's foremost consideration in its creation of the Medicaid program. . . . The benefits to a nursing home from its participation in Medicaid reimbursement results from nothing more than a statutory business relations." Id. at 607

Thus, the Court made it clear that the Medicaid program was not designed to assist nursing homes.

In the more recent case of Green v. Cashman, 605 F.2d 945 (6th Cir. 1979) the Ohio Department of Health was attempting to cut off Medicaid payments to a nursing home because the home was allegedly not safe for occupancy by Medicaid recipients. In its opinion the Court stated:

> "We do not find in the statue authorizing Medicare and Medicaid any legislative intention to provide financial assistance to providers of care for their own benefit. Rather, the statute is designed to aid the patients and clients of such facilities."

Thus, the Court made it clear that a hearing for the health care provider before the cutoff of payments was unnecessary. In another Sixth Circuit opinion, Madeline Marie Nursing Home v. Ohio, 694 F. 2d 433 (6th Cir. 1982), the Court was asked to determine the rate of reimbursement under Medicaid in light of the state's claim against a nursing home operator in bankruptcy proceedings. The Court quoted its own language in Green v. Cashman and thus, by recognizing its language of three years earlier, the Court reemphasized its position that Medicaid and Medicare are financial assistants to patients and clients and not to health care providers. Id. at 441; see also, Chelsea Community Hospital v. Michigan Blue Cross, 630 F.2d 1131 (6th Cir. 1980).

In Pennsylvania Pharmaceutical Ass'n v. Department of Public Welfare, 542 F.Supp. 1349 (W.D.Pa. 1982) a group of pharmacists were seeking to increase the reimbursement they received from Medicaid when filling a prescriptions for Medicaid recipients. In disallowing the pharmacists' claim the Court stated: "Congress enacted Title XIX of the Social Security Act to provide health care for the poor and aged, not to subsidize or otherwise benefit health care providers (see cases cited therein). . . . The poor, not the health care providers are the intended beneficiaries of the Medicaid Act." Id. at 1356; United States v. Fairlane Memorial Convalescent Homes, Inv., 501 F.Supp. 863, 871 (E.D.Mich. 1980). Earlier in its decision the Court went even further in demonstrating that the pharmacists' interest in Medicaid is minimal, thus establishing that Medicaid was not designed as F.F.A. to them as a group. The Court reasoned that the pharmacists failed to have standing to challenge the pay structure of Medicaid because "it would appear that they failed even to satisfy the cause-of-injury requirements, but even as to them we will rest our decision on the zone-of-interest test of the standing requirement, because it is clear that the pharmaceutical plaintiffs are not within the group that Congress intended to benefit through the enactment of the Medicaid program." Pennsylvania Pharmaceutical Ass'n v. Department of Public Welfare, 542 F. Supp. at 1355, n. 7.

It was again made clear by a Court that Medicaid constitutes aid to the individual recipient rather than the health care institution in the recent case of In Re Estate of Smith, 557 F.Supp. 289 (D.Colo. 1983).

> "Medicaid is not a program for the federal government to provide medical services. It is a system for federal funding of state plans to furnish health care to needy persons through agreements with private and public persons and institutions capable of providing such services." Id. at 294 (Emphasis added)

See also, Harris v. McRae, 448 U.S. 297, 308-09, 100 S.Ct. 2671, 2683 (1980). The Court was faced with determining whether the state's Medicaid reimbursement system was valid in regards to a group of nursing homes in the case of Illinois Counsel for Long Term Care v. Miller, 503 F.Supp. 1091 (N.D.Ill. 1980). In determining that the state had the power to control how health care providers were compensated the Court held that the state "has an important interest in insuring that low income residents of nursing homes receive quality care." The Court then cited Green v. Cashman, 605 F.2d 945 (6th Cir. 1979) in a footnote that quoted the Green Court's language stating that Medicare and Medicaid were not intended to provide F.F.A. to providers of care. Illinois Counsel for Long Term Care v. Miller, 503 F.Supp. at 1098, n. 11. This determination and analysis by the Court indicates its recognition that Medicaid and Medicare are directed at and are assistance to the patients and clients and not the health care provider.

An additional argument to the one that Medicare and Medicare do not constitute F.F.A. is the argument that Medicaid and Medicare are payments for services rendered rather than assistance. In Trageser v. Libbie Rehabilitation Center, 462 F.Supp. 424 (E.D.Va. 1977), aff'd. 590 at F.2d 87 (4th Cir. 1978), cert. den. 442 U.S. 949 (1979) the District Judge stated:

> "The federal funds received by the nursing home are not 'federal financial assistance' but rather payment for services rendered. Federal judges receive federal salary checks each month but it is not supposed that this is 'assistance' it is

> presumed that they are being paid an approximation at least of what they should be compensated for judging."

Indeed Medicare and Medicaid funds are paid to health care providers only to discharge or partially discharge debts incurred by patients who receive treatment. The administrators of Medicare and Medicaid are not involved in the delivery of health care services and play no part in the medical decision-making process. Their sole involvement is to receive a claim and process it under the law and, if the law so provides, to pay a portion of the patient's debts.

As the previous discussion indicates, although a few District Courts have held otherwise, Courts have repeatedly held that Medicare and Medicaid do not constitute F.F.A. In addition, an examination of the cases cited by the Courts in Baylor in support of the contrary position reveals their weak precedential value. For example, the case of United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981) was cited by the Courts as holding Medicare and Medicaid are F.F.A. In fact the issue was not even considered by the Court, the Court there deciding only that the primary purpose of Medicare and Medicaid was not to provide employment. The only reference to whether Medicare and Medicaid constituted F.F.A. was in a passing reference in a footnote in the District Court's decision, a point not even considered in the Appellate Court.

Also cited by the Court in Baylor was the case of Cook v. Ochsner Foundation Hospital, supra, as supporting the proposition that Medicare and Medicaid constitute F.F.A. Based on the fact that three hospitals had signed "assurances of compliance" the Court in Cook held the hospitals were subject to Title VI. The Court then decided coverage was by agreement not that receipt of Medicare funds was itself receipt of F.F.A. The simple signing of a document by the hospital should not in itself be enough to transform Medicaid and Medicare payments into F.F.A. Particularly in light of the fact that the hospitals signed the "assurances" while being told by H.E.W. officials that the forms would never be used against them to interfere in the operation of the hospitals. Id. Thus the Court's opinions in Cook and United States v. Cabrini Medical Center are based upon poor reasoning and should be ignored or overruled.

In the case of Flora v. Moore, 461 F.Supp. 1104 (N.D.Miss. 1978), a case also relied on by the Court in United States v. Baylor University Medical Center, the Court did not directly address the issue of whether Medicare and Medicaid constitute F.F.A. The focus of the case was the standing under Title VI of the Civil Rights Act of 1964 to sue a hospital for discriminatory employment practices. The Court held that since the employees were neither the United States or any recipient patient they were without standing. Id. at 1115. While the Court recognized that it is necessary one be a recipeient of F.F.A. before coming under Title VI of the Civil Rights Act of 1964, the Court was not required to determine whether Medicare and Medicaid constitute such F.F.A.

The Courts also cited Bob Jones University v. Johnson, 396 F. Supp. 567 (D.S.C. 1974), aff'd without opinion, 529 F.2d 514 (4th Cir. 1975). In this case the Court was asked to determine whether the University received F.F.A. in order to bring it within Title VI of the Civil Rights Act of 1964. The Court held that the University did receive F.F.A. in the form of veterans education benefits. The Court did not and was not required to determine whetehr Medicaid and Medicare payments constitute F.F.A.

In NAACP v. Wilmington Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979) the Appellate Court did not directly address the issue of whether Medicare and Medicaid were F.F.A. along with "other" assistance in reaching its decision. In fact it does not appear to be an issue raised on appeal.

The Court in United States v. University Hospital of SUNY at Stoney Brook 729 F.2d 144 (2d Cir. 1984) assumed Medicare and Medicaid F.F.A. without deciding the issue since such a finding was not necessary to the decision of the Court. Once again this involved a lower court decision that Medicare and Medicaid constituted F.F.A. a holding which was not reviewed on appeal.

Both Courts in United States v. Baylor University Medical Center, acknowledged the existence of Trageser v. Libbie Rehabilitation Center, 463 F.Supp. 424 (E.D.Va. 1977) aff'd other gnds. 590 F.2d 87, Cert. Den. 442 U.S. 949 (1979). This case was discussed earlier in this memorandum and is directly opposed to the holding in the United States v. Baylor University Medical Center. While recognizing this opinion, the Baylor Courts did not distinguish this case, thus it is apparent that the Courts knew they were going against prior precedent but could provide no basis for doing so.

LEGISLATIVE HISTORY

In addition to basing its decision on prior case law, the Baylor Courts also asserted that the legislative history of Medicare supported the conclusion that Medicare and Medicaid are included in the meaning of F.F.A. As the Courts recognized, the legislative history of Title VI of the Civil Rights Act provides guidance as to the scope of coverage of that statute in addition to Section 504 of the Rehabilitation Act of 1973. Although the said Courts arrived at the conclusion that the legislative history indicated that Title VI would apply to hospitals and other institutions by virtue of their acceptance of Federal funds in the form of Medicare payments, close examination of the legislative history of Title VI leads to a contrary result. That history makes it clear that a party is not covered by statutes requiring receipt of F.F.A. simply because a dollar paid by the Federal government finds its way to that party's pockets. For example, in commenting on coverage, Representative Celler stated:

> ". . . Title VI would not affect an individual farmer who borrows money through a Government Agency. It would affect a distributor of those funds if the distributing Agency practices discrimination. . . . As appleid to this program, Title VI would preclude discrimination in connection with the eligibility of farmers for allotment payments--but would not require action to end discriminatory employment practices by farmers receiving allotments." (Emphasis added.) 110 Cong. Rec. 1520-21.

Similarly, Representative Mathias, commenting on the same point of coverage, noted:

> "Title VI of the Bill before us forbids the Government agencies administering Federal programs to discriminate. This is intended to protect bebeficiaries and the restriction is placed upon the agency, not the recipient." 110 Cong. Rec. 1602.

The comments of Representative Corman are even more to the point:

> "The fact of the matter is that Federal welfare programs are generally administered . . . by State and local governments, who act for us in a sense as an agent. We set up all kinds of rules and regulations as to what they must do if they are to distribute this Federal money. And we are adding one more requirement-- we are saying you cannot discriminate. . . .
>
> ****
>
> "We are going to see that this agent does not discriminate when it administers these programs for the Federal government."
>
> ****

> "Congress will make clear by the passage of this (Title VI) that when using Federal funds they are to be distributed without discrimination." 110 Cong. Rec. 2488

The common theme in the legislative history of Title VI is that Congress did not intend to make the Act all encompassing and all prevading. Rather, Congress intended to prevent those who administer the funds, activities and programs--those who make the decisions as to who does or does not participate and benefit--from discriminating. Congress did not intend to bring under the Act every person and entity that incidentally receives a dollar from the programs or activitites. This being true of Title VI, the same is true of Section 504.

When federal financial assistance is given, Congress expects the funds to be used for an intended purpose. Congress earmarks the funds for a particular program or activity to be conducted, and agencies are to see that the funds are used as designated. This is not the case with funds paid as reimbursement under Medicare and Medicaid. Health care providers serve a patient and the patient incurs a debt. A claim is made by or on behalf of the patient to whatever entity contracts to administer Medicare or Medicaid and a designated amount is paid to the halth care provider as partial reimbursement. At that point, federal and state interest ends. Once paid to the health care provider the funds are no longer under governmental control and the government has no continuing interest in how those funds are spent or used. The health care provider does not report what it does with the money, it does not use it for any designated purpose, and no law, rule or regulation directs or controls its use. There simply is no federally assisted program or activity involved when the funds are paid to the health care provider.

By applying this to health care providers in particular, it can been seen that their operations were not intended to be covered by the statutes requiring the receipt of F.F.A. solely because they provide hospital services to patients whose bills are paid by Medicare and Medicaid. The health care providers do not decide who does or does not qualify for Medicare or Medicaid, what services are or are not covered, or how much is paid on behalf of the beneficiaries. They provide a service--health care--to patients for whom the State or Federal government is willing to pay and that is all. They do not operate any kind of program or activity that receives F.F.A.

Contrary to the Baylor decisions neither Medicare or Medicaid is intended to nor do they in fact provide assistance to a health care provider. As stated by the Sixth Circuit in Green vs. Cashman, 605 F.2d 945 (6th Cir. 1979).

> "We do not find in the statute authorizing Medicare and Medicaid any legislative intention to provide financial assistance to providers of care for their own benefit. Rather, the statute is designed to aid the patients and clients of such facilities." Id. at 946

See also Paramount Convalescent Center v. Dept. of Health Care Services, 542 P.2d 1, 5, 125 Cal.Rptr. 265 (Cal. 1975); Turecamo v. Commission of Internal Revenue, 554 F.2d 564, 571 (2d Cir. 1977); In Re Smith's Estate, 557 F.Supp. 288 (S.D.Colo. 1983).

The panel of the Fifth Circuit in Baylor in its haste to reach its conclusion of Medicare as F.F.A. cites legislative history with regard to Hill-Burton funds. This obviously misses the target as Hill-Burton funds amount to a grant to an institution not payment for services rendered on behalf of a patient as in the instance of Medicare and Medicaid.

CONTRACT OF INSURANCE

The Courts in Baylor were also incorrect in their determination that Medicare and Medicaid are not "insurance-type payments" and thus not exempt from Section 504 of the Rehabilitation Act of 1973, and Title VI of the Civil Rights Act of 1964 coverage by reason of the "contract of insurance" exclusion. 42 U.S.C. §§2000d-1, 2000d-4. It is clear that Medicare and Medicaid constitute programs of insurance. First, consider the very title of the Medicare Statute--"Subchapter XVIII--HEALTH INSURANCE BENEFITS FOR AGED AND DISABLED." Further, 42 U.S.C. §1395a states "Any individual entitled to insurance benefits under this Subchapter..." (Emphasis added). Part A of Medicare is "HOSPITAL INSURANCE BENEFITS FOR AGED AND DISABLED" and Part B is entitled, "SUPPLEMENTARY MEDICAL INSURANCE BENEFITS FOR AGED AND DISABLED." Again and again, throughout the Medicare statute, Congress refers to the program as insurance.

As if this were not enough in itself, the Fifth Circuit and other Courts have had no difficulty in recognizing that Medicare is an insurance program in all respects. As recently as May, 1984, the United States Supreme Court in Heckler v. Ringler, ___ U.S. ___, 104 S.Ct. 2013 (1984), a case involving a different Medicare issue, characterized that program as follows:

> "Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U.S.C. §1395 et seq. (1976 ed. and Supp.V), commonly known as the Medicare Act (Act), establishes a federally subsidized health insurance program to be administered by the Secretary. Part A of the Act, 42 U.S.C. §1395c et seq. (1976 ed. and Supp. V), provides insurance for the cost of hospital and related post-hospital services...." (Emphasis added.) 104 S.Ct. at 2016-2017.

Similarly, the Supreme Court of Texas, in an insurance case, held Medicare to be a true insurance program, stating in Black v. American Bankers Insurance Company, 478 S.W.2d 434, 439 (Tex. 1972)::

> ". . . it (Medicare) is an insurance program established by the United States Government and administered by the Social Security Administration from trust funds to which the beneficiaries contribute under Social Security taxes and Part B premiums. * * *The United States Government is the insurer under the program, and as such it agrees to pay specified hospital and medical expenses on behalf of the individual enrollees directly to those who furnish services. The Medicare insurance is similar in many respects to hospital insurance programs which are sold by many private insurance companies."

See, also, Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F.2d 329 (5th Cir. 1975); Szekely v. Florida Medical Ass'n, 517 F.2d 345 (5th Cir. 1975); Schmiedgen v. Celebreeze, 245 F. Supp. 825 (D.D.C. 1965); Chelsea Community Hospital v. Michigan Blue Cross Ass'n, 630 F.2d 1131 (6th Cir. 1980); District of Columbia Podiatry Society v. District of Columbia, 407 F.Supp. 1259 (D.D.C. 1975); Good Luck Nursing Home, Inc. v. Harris, 636 F.2d 573 (D.C. Cir. 1980).

By its very nature and operation, Medicare must be deemed to be an insurance program. Medicare, as far as the health care provider is concerned, is administered by an insurance company as agent for the Federal Government. The claim procedure followed by the health care provider for Medicare eligible patients is the same as for patients who rely on private insurance companies to pay their bills and assign their benefits. Like private insurance, Medicare has provision for deductibles paid by the patient, and under many circumstances pays only a stated percentage of claims. For example, under the deductible provisions of 42 U.S.C. §1395e, the patient must pay the deductible amount before Medicare commences paying, also under the co-insurance feature, after the 60th day and 90th day of a hospital stay, the patient is required to pay a portion of the hospital bill.

The Medicaid program is structured differently and as to the Federal Government is a program to fund State activities. As to health care providers, Medicaid operates as an insurance program for the needy administered by the States. Under Medicaid the Federal Government partially funds the State and the State acts as an insurer and reimburses health care providers for services rendered to eligible needy recipients. *See, e.g., Madison v. Mississippi Medicaid Commission*, 86 F.R.D. 178 (N.D. Miss. 1980); Klein v. Matthews, 420 F.Supp. 1005 (D.N.J. 1977).

Medicare is a statutory agreement by the government to establish and operate an insurance plan covering qualified individuals who are defined in the statute. This has been recognized again and again by the Courts. For example, in *Mt. Sinai Hospital v. Weinberger*, 517 F.2d 329 (5th Cir. 1975) the Court stated:

> "The system (Medicare) contains two . . . parts, one providing *insurance*, hospital and related post-hospital *services*, known as Part A, 42 U.S.C. §§1395(e)-1395(i)-2 . . .."

And later in the case:

> "Under Part A, the *hospital insurance* program, persons age 65 and *older* . . . receive essential hospital services . . . . paid for from a trust fund . . . ." (emphasis added.)

Thus, as the above discussion indicates, the numerous similar characteristics between public insurance contracts and Medicaid and Medicare make it clear that Medicaid and Medicare constitute insurance.

Both of the Courts in *U.S. v. Baylor* dismissed all of the foregoing--all of the legal precedent, all of the Congressional intent, all of the statutory language and the reality of Medicare and Medicaid administration--on the basis that the programs are "social insurance" and persons by law have to participate. This view was very eloquently rejected by the Court in *Schmiedgen v. Celebreeze*, supra at 827:

> "In dealing with Old Age Insurance provisions of the Social Security Act, it must be borne in mind that the payments prescribed by them are not gratuities or matters of grace; they are not public assistance; they are not welfare payments. On the contrary, the law created a *contributory insurance system* under which what in effect constitute premiums are shared by employees and employers. Consequently, in spirit at least, if not strictly and technically, the employee, who throughout his working life has contributed part of the premiums in the form of deductions from his wages or salary, should be deemed to have a vested right to the payment prescribed by the statutory scheme, which in effect comprises the terms of his insurance policy." (Emphasis added.) 245 F.Supp. at 827.

In holding that Medicare and Medicaid were not programs of insurance both Courts in *Baylor*, in clear disregard of legal precedent and unmistakeable *statutory* language, made a social policy decision that should be made by Congress through the legislative process.

CONCLUSION

Sound legal precedent, legislative history, and unambiguous statutory language,as well as logic, establish that Medicare and Medicaid payments to health care providers are not federal financial assistance to those providers and that those providers are not involved in the administration of any program receiving such assistance. The health care provider renders a service or provides goods, and it is up to the recipient of those services and goods to pay for them, whether with private insurance, Medicare or Medicaid, or otherwise.

To extend Title VI and Section 504 coverage to any person or entity receiving a Medicare or Medicaid dollar necessarily involves HHS and other agencies in every aspect of health care provider operations and even in the medical decision-making process itself. Not only this, it would add significantly to the costs of delivery of medical care in an already overburdened industry.

AMENDMENT NO. 1

Insert a limitation to the definition of "recipient" to read: "Provided, however, that reimbursement or payment for goods supplied, or services rendered, shall not constitute Federal financial assistance for purposes of this Act."

AMENDMENT NO. 2

Insert a limitation to the definition of "recipient" to read: "excepting receipt of funds paid under contracts of insurance or guaranty (such as under the Federal Deposit Insurance Corporation, Federal National Mortgage Association, Medicare, or Medicaid)".

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March 20, 1985

TO : Senate Judiciary Committee
Constitution Subcommittee
Attention: Randall Rader

FROM : Joseph A. Cislowski
Analyst in Social Legislation
Education and Public Welfare Division

SUBJECT : Potential Use of Federal Financial Assistance to Perform Abortions

In accordance to your request, the following is a list of Federal programs which, according to Rachel Gold of the Alan Guttmacher Institute (202) 296-4012, could potentially finance abortions:

1. Medicaid
2. Social Services Block Grant
3. Community Health Centers
4. Public Health Service Hospitals
5. Indian Health Service
6. Military Hospitals
7. CHAMPUS

It is important to remember that there are many restrictions on Federal funding of abortion. The first five programs are within the Department of Health and Human Services. The other two programs are within the Department of Defense. Because appropriations for both of these departments are restricted by Hyde-type abortion limitations, these funds may not be used to perform abortions except for cases of life-endangerment to the mother or rape or incest.

The enclosed "Abortion: Judicial and Legislative Control" issue brief contains a good description of the Hyde-type abortion limitations. Background on each of the programs listed above is also enclosed.

Senator **Hatch**. Our next witness is Prof. Norman Dorsen, law professor at New York University. Professor Dorsen has been before our committee before. He is the current president of the American Civil Liberties Union. I want to say, Professor, we appreciate your presence here today and we look forward to your comments and we will turn to you at this time.

STATEMENT OF NORMAN DORSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION

Mr. **Dorsen**. Thank you very much, Senator Hatch. This is my first appearance before your subcommittee this year. It is good to see you looking so well——

Senator **Hatch**. It is good to see you.

Mr. **Dorsen** [continuing]. After the events of last November. I am happy to appear before your distinguished committee. I just note preliminarily that I also welcome Senator DeConcini's generous remarks and the spirit of tolerance with which he spoke. There are obviously deep divisions on this issue, but I work on the unshakeable assumption that we are all trying to do the right thing.

Finally, I appreciate your staff authorizing me to leave by 11:15 because I must catch a plane back to New York, and I am grateful for the way you scheduled the hearing partly to accommodate my return.

Senator **Hatch**. In that regard, we will, without objection, put all statements in the record. If you can summarize it, it would leave me a little more time for questioning. I have got to leave at about 10 to 11 because of a press conference I need to attend.

Mr. **Dorsen**. I think Professor Rosenblum, with his customary terseness, set a good standard and I do not think I will exceed his remarks. I should say though for the record that I served before practicing law in New York as a law clerk to Chief Judge Calvert McGruder of the U.S. Court of Appeals for the First Circuit and as law clerk for Justice John Marshall Harlan of the U.S. Supreme Court. Beginning in 1962, I appeared as counsel in numerous constitutional cases in the Supreme Court and other courts. Since 1961, I have been a member of the faculty of New York University Law School, where I am now Stokes Professor of Law. I have been a visiting professor and have lectured at many other law schools, including Harvard, Texas, Michigan, Illinois, and Georgetown University.

I was president of the Society of American Law Teachers from 1973 to 1975. I also argued the first abortion rights case heard by the U.S. Supreme Court and was on the brief in *Roe* v. *Wade*.

Finally, as you noted, since 1976 I have been president of the American Civil Liberties Union and I am testifying in that capacity today, accompanied by our legislative counsel, Muriel Morisey Spence and Leslie Harris.

I do not intend to review, given the time situation, general questions about the alleged rights of the unborn and their relationship to civil rights generally in the United States. Instead, I intend to address section 522 and indicate why in our opinion it is both unwise and presents serious constitutional problems.

Before addressing the merits, I must express some concern about the truncated process that has governed consideration of this important bill. Title VI of the Civil Rights Act of 1964 is the cornerstone of American legal protection against race discrimination. Whatever the scheduling vicissitudes, one hearing does not seem to be a fair or sufficient basis for judging a bill that has such sweeping and disturbing implications.

I strongly urge this committee not to rush to a premature and ill-considered judgment. Further hearings should be held to permit all affected parties to testify while the record is left open for submission of detailed legal memoranda.

The sponsor's reluctance to subject S. 522 to such broad scrutiny is perhaps understandable. Presented as a simple codification of the Hyde amendment, S. 522 in fact threatens the integrity of the 1964 Civil Rights Act by introducing a wholly extraneous element—a congressional declaration that civil rights protections begin at the moment of conception. This bill is, in short, not what it purports to be, an effort to make the Hyde amendment permanent. It is instead a bald attempt to reverse *Roe* v. *Wade*. As such, it is in violation of the Constitution.

Moreover, S. 522 is a veiled effort to confuse and delay debate over S. 431, the Civil Rights Restoration Act, and thus to undercut congressional efforts to restore longstanding laws protecting the rights of minorities, women, the disabled, and old and young people.

S. 522 is in form a limitation on the use of Federal money for abortion. But the purpose and effect of the bill are, as its title suggests, substantive—to confer civil rights on fetuses and thus prevent or at least obstruct the exercise of the constitutional rights of choice recognized in *Roe* v. *Wade*. This purpose is both inconsistent with the purpose and structure of title VI and with *Roe* v. *Wade* itself.

The Hyde amendment, because it is attached to an appropriations measure, is a congressional instruction that money appropriated by that bill may not be spent in certain ways. It neither grants nor advances substantive or procedural rights of any person; nor does it affect the legal status of fetuses in any manner.

On the other hand, title VI is a substantive civil rights statute which Congress enacted to effectuate the longstanding constitutional prohibition on government complicity in race discrimination. For this history see, for example, the opinions of Justices Powell and Brennan in the *Bakke* case.

More specifically, title VI is a legislative embodiment of the 14th amendment's "restriction against discrimination in the use of Federal funds * * * title VI simply spells out the procedure to be used in enforcing that restriction." It neither authorizes nor appropriates any funds. It provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

By appending a ban on appropriations to title VI, as S. 522 would do, the constitutionally grounded promise and meaning of title VI would be diluted and diverted.

Furthermore, S. 522 is defective because it would give fetuses the protection of title VI from the moment of conception. But Congress lacks the power to so redefine personhood for 14th amendment purposes.

Roe v. *Wade*, we must recall, explicitly ruled that the word "person" as used in the 14th amendment does not include the unborn. Instead, it recognized that a woman in consultation with her physician had a constitutional right to choose whether or not to bear a child. That decision has been reaffirmed in numerous Supreme Court decisions, including the recent *Akron* case.

A declaration by Congress that a fetus is a "person," whether made explicitly in congressional findings or implicitly through an existing civil rights statute, would effectively destroy the constitutional right recognized in *Roe* v. *Wade* and its progeny.

Congress' power to enforce the commands of the 14th amendment through appropriate legislation cannot be exercised in a manner that would "restrict, abrogate or dilute" the amendment's guarantees. To do so would usurp the judicial function, as Justice O'Connor recently observed in the *Hogan* case, decided by the Supreme Court in 1982.

A further and equally insidious consequence of enacting S. 522 would be to make title VI's existing and potent enforcement scheme a nationwide barrier to abortions, contrary to the tenets of the Supreme Court. Senator Hatch and others urge that title VI restrictions are "targeted to the types of funding currently covered by the Hyde amendment" and thus use of its enforcement powers "does not represent a departure from current policies restricting funding of abortion." But this is plainly not the case.

The Hyde amendment is a restriction only on the use of Federal Medicaid money for abortion. In contrast, title VI prohibits the use of all Federal money for discriminatory purposes. Accordingly, S. 522 would affect almost every hospital and health facility in the country. If enacted, it would require the State to attach abortion restrictions to any Federal funds disbursed to hospitals or other medical facilities.

Moreover, title VI absolutely prohibits recipients from engaging in the proscribed discrimination within the program or activity which receives any Federal funds. Recipients of Federal financial assistance do not simply promise to make sure that their discriminatory activity is carried out only with non-Federal dollars. They must cease discrimination altogether if they receive Federal funds. Any other result would be a mockery of title VI and would make enforcement a sham.

Since S. 522 would add an abortion prohibition to title VI, it would have a comparable effect on the ability of any institution that received Federal funds to perform abortions, whether or not these funds were used for that purpose. This plainly would defeat the constitutional right in *Roe* v. *Wade*.

Whether the phrase "program or activity" is viewed narrowly, as in the Supreme Court's decision in the *Grove City* case, or more broadly, as S. 431 would provide, the abortion prohibition would extend at least to every hospital's obstetrics and gynecology department.

Indeed, notwithstanding claims to the contrary, almost every hospital in the United States currently must comply with title VI. Virtually all participate in Federal programs like Medicaid or title X of the Public Health Service Act. Most were constructed or renovated in part with Federal funds.

S. 522 would therefore operate as a nationwide ban on hospital-based abortions, without regard to whether it could be proven that new Federal dollars were used for abortion procedures, because a hospital lodged in a structure built or renovated with any Federal funds must comply with title VI in all of its operations. Furthermore, private outpatient clinics which receive Federal funds for construction or other purposes would also have to comply with the abortion ban.

These far-reaching effects are beyond the authority of Congress. In upholding the constitutionality of the Hyde amendment, the Supreme Court noted that the amendment merely expressed a preference for childbirth over abortion and thus, by failing to finance abortions, the Federal Government placed no obstacles in the path of a woman who chooses to terminate her pregnancy. But if Congress amends title VI in the manner contemplated, an insurmountable Government obstacle would have been placed in the path of women choosing to terminate a pregnancy. The burden on access would be total as a practical matter. The conclusion is clear: The privacy right recognized in *Roe* v. *Wade* precludes such congressional action.

Unlike the Hyde amendment, S. 522 also raises novel enforcement questions that would potentially interfere with constitutional rights. Under the Hyde amendment, States that perform Medicaid abortions simply cannot apply for reimbursement from the Federal Government. No judicial relief is available. Title VI, by contrast, permits enforcement through private lawsuits by aggrieved individuals.

While the nature of relief available to private litigants and the standard of proof that must be met in such suits remains unsettled, see the recent *Guardians Association* case, the courts would have to decide whether to grant legal standing to fetal guardians seeking an injunction against abortions. At least until this issue has been settled definitively, the bill would precipitate an enforcement nightmare that would further chill the exercise of constitutional rights.

Finally, S. 522 is ill-advised for yet another reason. If as we fear, hospital-based abortions are prohibited nationwide, it would be an unprecedented and dangerous interference with the exercise of medical judgment and a serious threat to women's health, particularly those with health problems who need the support of a hospital setting.

Congress enacted title VI to advance the constitutional guarantee of freedom from race discrimination. As I have tried to show, this statute would turn title VI on its head, making it a tool for the subversion of another constitutional guarantee, the right to choose whether to bear a child without Government interference. Title VI would become a nationwide barrier to the exercise of a right that all women possess in consultation with their physicians. It is difficult to imagine a more direct assault on the integrity of the Civil Rights Act or on reproductive freedom.

Thank you very much.

[The prepared statement of Mr. Dorsen and a letter to Senator Hatch follow:]

PREPARED STATEMENT OF NORMAN DORSEN

My name is Norman Dorsen. I am a lawyer, admitted to practice in New York State, the District of Columbia, and other federal courts including the Supreme Court of the United States. Before entering the private practice of law, I served as law clerk to Chief Judge Calvert Magruder of the U.S. Court of Appeals for the First Circuit and for Justice John Marshall Harlan of the U.S. Supreme Court. Beginning in 1962, I appeared as counsel in numerous constitutional cases in the Supreme Court and other federal and state courts. Since 1961, I have been a member of the faculty of New York University Law School, where I am now Stokes Professor of Law. I have been a visiting professor and have lectured at many other law schools, including Harvard, Texas, Michigan, Georgetown, and the University of California at Berkeley. I was President of the Society of American Law Teachers from 1973-75. I argued the first abortion rights case ever heard by the U.S. Supreme Court and was on the brief on Roe v. Wade, 410 U.S. 113 (1973).

Finally, I am and have been since 1976 the President of the American Civil Liberties Union. It is in that capacity that I am testifying today. I am accompanied by ACLU legislative counsel Muriel Morisey Spence and Leslie Harris.

Before I address the merits of S.522, I must express my concern about the truncated process that has governed consideration of this bill. Title VI of the Civil Rights Act of 1964 is the cornerstone of American legal protection against race discrimination. One hastily scheduled hearing is simply not a fair or sufficient basis for judging a bill that has such sweeping and disturbing implications for that historic statute. I strongly urge this committee not to rush to a premature and ill-considered judgment. Further hearings should be held to permit all affected parties to testify while the record is left open for submission of detailed legal memoranda.

The sponsor's reluctance to subject S.522 to close scrutiny is understandable. Presented as a simple codification of the

"Hyde" amendment, S.522 in fact threatens the integrity of the 1964 Civil Rights Act by introducing a wholly extraneous element -- a congressional declaration that civil rights protections begin at the moment of conception. This bill is, in short, not what it purports to be, an effort to make the Hyde Amendment permanent. It is instead a bald attempt to reverse Roe v. Wade. As such, it is in flagrant violation of the Constitution.

Moreover, S.522 is a veiled effort to confuse and delay debate over S.431, the Civil Rights Restoration Act, and thus to subvert Congressional efforts to restore longstanding laws protecting the rights of minorities, women, the disabled, the old and the young.

S.522 is in form a limitation on the use of Federal money for abortion. But the purpose and effect of the bill is, as its title suggests, substantive - to confer civil rights on fetuses and thus prevent or at least obstruct the exercise of the Constitutional rights of choice recognized in Roe v. Wade. This purpose is both unconsistent with the purpose and structure of Title VI and with Roe v. Wade.

Because it is attached to an appropriations measure, the "Hyde" amendment is a congressional instruction that money appropriated by that bill may not be spent in certain ways. It neither grants nor advances substantive or procedural rights of any person; nor does it affect the legal status of fetuses in any manner.

On the other hand, Title VI is a substantive civil rights statute which Congress enacted to effectuate the longstanding constitutional prohibition on government complicity in race discrimination. See, e.g., the opinions of Justice Powell and Brennan in Regents of the University of California v. Bakke 438 U.S.265 (1978). More specifically, Title VI is a legislative embodiment of the Fourteenth Amendment's "restriction against discrimination in the use of Federal funds.... Title VI simply spells out the procedure to be used in enforcing that restriction." 438 U.S. at 286. It neither authorizes nor appropriates any funds. It provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [emphasis added]

By appending a ban on appropriations to Title VI, as S. 522 would do, the majestic and constitutionally-grounded promise and meaning of Title VI would be diluted and diverted.

Furthermore, S. 522 is defective because it would have the effect -- intended by its sponsor -- to give fetuses the protection of Title VI from the moment of conception. But Congress lacks the power to so redefine personhood for Fourteenth Amendment purposes. Roe v. Wade, we must recall, explicitly ruled that the word "person" as used in the Fourteenth amendment does not include the unborn. Instead, it recognized that a woman in consultation with the physician had a constitutional right to choose whether or not to bear a child. That decision has been reaffirmed in numerous decisions. E.g. Akron v. Akron Center for Reproductive Health 76 L. Ed 2d 687(1983).

A declaration by Congress that a fetus is a "person," whether made explicitly in congressional findings or implicitly through an existing civil rights statute, would effectively destroy the constitutional right recognized in Roe v. Wade and its progeny. Congress' power "to enforce" the commands of the Fourteenth Amendment through appropriate legislation cannot be exercised in a manner that would "restrict, abrogate or dilute" the amendment's guarantees. See, Katzenbach v. Morgan 384 U.S. 641, 651 note 10 (1966). To do so would usurp the judicial function, as Justice O'Connor recently observed in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-733 (1982). A further and equally insidious consequence of enacting S.522 would be to make Title VI's "existing and potent enforcement scheme" a nationwide barrier to abortions, contrary to the tenets of the Supreme Court. Sen. Hatch urges that Title VI restrictions are "targeted to the types of funding currently covered by the Hyde amendment" and thus use of its enforcement powers "does not represent a departure from current policies restricting funding of abortion." But this is plainly not the case.

The Hyde Amendment is a restriction only on the use of federal medicaid money for abortion. In contrast, Title VI prohibits the use of all federal money for discriminatory purposes. Accordingly, S. 522 would affect almost every hospital and health facility in this country. If enacted, it would require the state to attach abortion restrictions to any federal funds disbursed to hospitals or other medical facilities. Moreover, Title VI absolutely prohibits recipients from engaging in the proscribed discrimination with in the "program or activity" which receives any federal funds. Recipients of federal financial assistance do not simply promise to make sure that their discriminatory activity is carried out only with non-federal dollars. They must cease discrimination altogether if they receive federal funds. Any other result would be a mockery of Title VI and would make enforcement a sham. Since S. 522 would add an abortion prohibition to Title VI, it would have a comparable effect on the ability of any institution that received federal funds to perform abortions, whether or not these funds were used for this purpose. This plainly would defeat the constitutional right in Roe v. Wade.

Whether the phrase "program or activity" is viewed narrowly, as in the Supreme Court's decision in Grove City College v. Bell, or more broadly, as S.431 would provide, the abortion prohibition would extend at least to every hospital's obstetrics and gynecology department.

Indeed, notwithstanding the claims to the contrary, almost every hospital in the United States currently must comply with of Title VI. Virtually all participate in Federal programs like

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medicaid or Title X of Public Health Service Act. Most were constructed or renovated in part with Federal funds. S.522 would therefore operate as a nationwide ban on hospital-based abortions without regard to whether it could be proven that new federal dollars were used for abortion procedures because a hospital lodged in a structure built or renovated with any Federal funds must comply with Title VI in all of its operations (45C.F.R. § 80.4(a). Furthermore, private outpatient clinics which receive federal funds for construction or other purposes would also have to comply with the abortion ban.

These far reaching effects are clearly beyond the authority of Congress. In upholding the constitutionality of the "Hyde" amendment the Supreme Court noted that the amendment merely expressed a preference for childbirth over abortion and thus, by failing to finance abortions, the federal government placed no obstacles in the path of a woman who chooses to terminate her pregnancy, 448 U.S. 297, 315. But if Congress amends Title VI in the manner contemplated, an insurmountable governmental obstacle would have been placed in the path of women choosing to terminate a pregnancy. The burden on access would be total as a practical matter. The privacy right recognized in *Roe* v. *Wade* clearly precludes such congressional action. See, e.g., *Akron*, *supra* 76 L. Ed 2d at 701-704; *Doe* v. *Bolton* 410 U.S. 179(1973).

Unlike the Hyde Amendment, S.522 raises novel enforcement questions that would potentially interfere with constitutional rights. Under the Hyde Amendment, states that perform medicaid abortions simply cannot apply for reimbursement from the federal government. No judicial relief is available. Title VI by contrast permits enforcement through private lawsuits by aggrieved individuals. While the nature of relief available to private litigants and the standard of proof that must be met in such suits remains unsettled, see, *Guardians Association* v. *Civil Service Commission of the City of New York*, ___ U.S.______ 77 L Ed. 2d. 866(1983), courts would have to decide whether to grant legal standing to fetal guardians seeking an injunction against abortions. At least until this issue has been settled definitively, the bill would precipitate an enforcement nightmare that would further chill the exercise of constitutional rights.

Finally, S.522 is ill-advised for yet another reason. If as we fear hospital-based abortions are prohibited nationwide, it would be an unprecedented and dangerous interference with the exercise of medical judgment and a serious threat to women's health -- particularly for women with health problems who need the medical support available in a hospital setting. See, e.g. Whalen v. Roe 429 U.S. 589, 604 n33 (1977).

Congress enacted Title VI to advance the constitutional guarantee of freedom from race discrimination. This statute would turn Title VI on its head, making it a tool for the subversion of another constitutional guarantee -- the right to choose whether to bear a child without government interference. Title VI would become a nationwide barrier to the exercise of a basic right that all women possess in counsultation with their physicians. It is difficult to imagine a more direct assault on the integrity on the Civil Rights Act or on the right to reproductive freedom.

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Ref: 02cr03

June 4, 1985

Senator Orin Hatch
SR-135 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

Thank you for your letter of May 1, 1985. We have carefully reviewed the questions presented and our testimony on S.522. Upon full reflection, we feel the record will be clearest and best served if we rest on our written testimony and my responses to questions posed at the hearing.

I appreciate the opportunity to supplement the record.

Sincerely,

Norman Dorsen
President

Senator HATCH. Thank you very much.

We are going to turn now to Senator McConnell who would like to make a statement. He has another Judiciary Committee hearing he has to get to, but I would like to give him time to make his statement. I am just going to leave for a minute, but will be right back.

Senator MCCONNELL. Thank you, Mr. Chairman. I just wanted to commend you for holding these hearings on S. 522, and tell the witnesses that we all schedule things at the same time in this business, and what I am going to do is—have you finished your statement?

Mr. DORSEN. Yes, I have, Senator. Thank you very much.

Senator MCCONNELL. I will call on whoever is next. Prof. Robert Destro, it looks like you are up.

STATEMENT OF ROBERT A. DESTRO, ASSISTANT PROFESSOR OF LAW, CATHOLIC UNIVERSITY OF AMERICA

Mr. DESTRO. Thank you, Senator. It is a pleasure to be here this morning. I would also like to start out my testimony with a short disclaimer. The record indicates that I am an assistant professor of law at Catholic University. I am also a member of the U.S. Civil Rights Commission. I would like to note for the record that my comments today are my own opinion and do not necessarily reflect either the position of the university or the U.S. Civil Rights Commission, which is forbidden by Federal law to even involve itself in the abortion debate. So with that, let me begin.

Senator MCCONNELL. You have covered yourself.

Mr. DESTRO. I would like to start out, just as a short introduction, to say that I bring to this testimony some of my own experience, not only in abortion funding litigation prior to the Supreme Court's decision in *Harris* v. *McRae*, but also a fair amount of experience in dealing with those individuals who have claimed the rights to oppose, on grounds of conscience, using their own money and their tax dollars to pay for abortions.

So I would like to start out with the comment that I believe that S. 522 is a very good first step toward getting the Federal Government out of the abortion funding business. I agree with Professor Rosenblum that it enacts Hyde into substantive law. It does no more than that except, as he points out, to extend Hyde to the entire range of Federal Government operations.

Because it is attached to a civil rights law, I would like to highlight some of the limits of this bill. It is not, in my judgment, a true civil rights bill for the unborn, and it does not—in its present form—make any attempt to override *Roe* v. *Wade*. But it does highlight the civil rights problems inherent in *Roe* and which have been troublesome from the beginning.

Thus while I support the bill as a first step, I would urge that the bill go further and address all the civil rights issues created by *Roe* v. *Wade*.

I will touch upon two separate aspects of the civil rights issues of which I speak. The first is the idea that Professors Dorsen and Rosenblum touched upon: Civil rights for the unborn. In my judgment, civil rights for the unborn are not provided for by this bill, but it does raise the issue for discussion.

I believe that Congress is, and should serve as the ultimate protector of civil rights in this country. The Supreme Court has been grossly wrong on civil rights issues before. *Plessey* v. *Ferguson* and *Dred Scott* v. *Sanford* are two pristine examples in the case of race relations. The Congress should not hesitate to use its power of the purse to assure that *Roe* v. *Wade* will not be given either additional credence, or the stamp of congressional approval which comes from Federal funding of abortions.

In addition, another civil rights issue is at stake here: The civil rights of millions of dissenters whose taxes are taken to fund abortion. This bill only goes part way. It takes only the Federal Government out of what I would call "direct" support of abortions. It gives no assurances that Federal power will not be used indirectly, as a means to compel States, localities, and private individuals to use their own money to subsidize the abortions of others.

If I may degress for a minute, I would like to address one of the concerns that Senator Metzenbaum spoke of when he talked about imposing one's views on others. If that is an issue in the abortion controversy generally, I believe that one should start out any discussion of abortion funding with the franic recognition that imposing one's views is probably the central issue. One's moral views of abortion are central to the abortion funding issue because the funding of abortion by government assumes that abortion is a social good, and that, because the Supreme Court has declared that abortion is a constitutional right—just as, once upon a time it declared that slave holding was a matter for constitutional protection—the Federal Government should subsidize the practice.

We have a number of constitutional rights in this country, none of which are subject to funding. Perhaps the most illustrative one that many people disagree with is the right to bear arms. We certainly do not go out and buy people guns. Why? Because we do not think possession of guns is a social good.

So then, lack of abortion funding by the Federal Government without positive protection for the unborn leaves Congress neutral with respect to abortion. It protects millions of prolife Americans participating in the abortion of others. I see both abortion and forced subsidy as a denial of basic human rights. We should not forget during such debates that the Supreme Court, or I should say, seven members of the nine member Supreme Court, imposed their moral views on all 50 States and the Federal Government when they decided *Roe* v. *Wade* back in 1973.

Congress has the right to control spending notwithstanding the Supreme Court's views on abortion and I would commend the second inaugural address of Abraham Lincoln to anyone who would argue that the Supreme Court should be the final word on such questions involving fundamental human rights. The Supreme Court has a limited role to play in this debate, and Congress and the President should play a major role in pushing the terms of debate more in the direction of the human rights issues that are involved.

Now, with respect to the bill itself, I should note that the bill, as drafted, does not, in my judgment, go as far as title VI currently does. It does move a step in that direction, but it does not go the whole way. Title VI uses the congressional spending power, not section 5 of the 14th amendment, to assure that Federal funds are not used to support discriminatory conduct on the basis of race, as Professor Rosenblum seems to suggest, but I disagree with him that Congress could not go that far.

The central issue, I believe, is what is the relationship of this bill to the Civil Rights Act of 1964, taken as a whole. The bill is split into two parts. The first part seeks to assure that the Civil Rights Act of 1964 will not be used to compel Federal funding of abortion.

I discuss many of the issues raised here in my written testimony and I would ask the chairman if that could be admitted for the record. I will not repeat that testimony here. I would just address a couple of points.

Senator HATCH. Without objection, we will put it in the record.

Mr. DESTRO. Fine. Thank you.

The Civil Rights Act of 1964 should be seen as a whole. Title VI is only one part of that act. The Civil Rights Act covers discrimination. Title VII covers sex, religious and national origin discrimination, and other civil rights acts not part of the Civil Rights Act of 1964 deal with such things as discrimination on the basis of age, sex, and handicapped.

As I point out in my testimony, there are a number of civil rights issues that arise from *Roe*. The primary one, obviously, is the right of the unborn to life. I believe that this bill does take the Federal Government part of the way out of this issue. I also urge that the Federal Government and Congress consider getting Federal agencies out of the business of using Federal power to compel States and private individuals to spend their own money on abortion.

The regulations under title IX of the Education Amendments of 1972 have required universities and other educational institutions to pay for abortion. To refuse is to be guilty of sex discrimination. This forces private individuals and employers to provide abortion funding. Such a policy is inconsistent with the Civil Rights Act of 1964, for it prohibits forcing employers to pay for abortions through health insurance policies in section 2000e(k) of title VII.

So, in the interest of keeping my testimony short so that you can ask some questions, I would simply state that this bill is a good first step. I support it only as a first step, I would urge that Congress give some serious consideration to making it broader, and, down the road a bit, using it to challenge the central theses of *Roe v. Wade* itself. Thank you.

[The statement of Mr. Destro follows:]

PREPARED STATEMENT OF ROBERT A. DESTRO*

Good morning, Mr. Chairman. It is a pleasure to have been invited to address the Committee this morning. Before I begin, however, I would like to point out for the record that I testify this morning on my own behalf as a constitutional law professor and long-time pro-life advocate and litigator. My comments, therefore, are my own opinion and do not necessarily reflect either the position of my University, or the United States Civil Rights Commission, which is forbidden by federal law to involve itself in the debate over abortion.

I have been asked to address the probable effects of S.522, which is intended to amend Title VI of the Civil Rights Act of 1964 to protect the rights of unborn children. The operative language of S. 522 provides, in full:

> Sec. 606. Nothing contained in the Civil Rights Act of 1964 shall be construed to authorize the use of Federal financial assistance for abortions and no such assistance shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

For purposes of analysis, it will be useful to divide the proposed section 606 into its two constitutent parts, and to analyze each in light of existing law and its intended purpose. The bill attempts to deal with the question of abortion funding in two ways:

1. It eliminates any possibility that the Civil Rights Act of 1964 will be construed to authorize the use of federal financial assistance for abortions; and

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* Assistant Professor of Law, Columbus School of Law, Catholic University of America. Member United States Commission on Civil Rights.*

2. It provides that no [federal financial] assistance shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

Before I begin my detailed analysis of the bill, however, I would like to digress for a moment to discuss what I believe to be a number of preliminary conceptual issues which are crucial to a complete understanding of the strengths and weaknesses of this bill in its present form.

Intention of the Bill

From a preliminary review of the language of the bill and the remarks of its sponsor, it appears that the bill has three distinct purposes:

First: to protect the civil rights of the unborn;

Second: to negate any possibility that the civil rights laws will be used as a basis for requiring the use of federal funds for abortion; and

Third: to enact a "permanent" Hyde amendment which would obviate the necessity for yearly Congressional action on abortion funding by enacting a blanket prohibition on the use of federal financial assistance for abortions except where the life of the mother would be endgangered if the fetus were carried to term.

The issues raised by each of these stated purposes may be summarized as follows:

Protection of the civil rights of the unborn

1. Does the bill protect the civil rights of the unborn, or merely restate the Congress' refusal to allow federal funds to be used for abortion?

2. Does the bill recognize that the unborn have any rights which others are bound to respect?

Use of the Civil Rights Act of 1964 to mandate federal funding of abortion

1. Has the Civil Rights Act of 1964 been used to mandate federal funding of abortion?

2. Have other civil rights statutes been used to mandate the funding of abortion by the federal or state governments, or by any other person?

3. What civil rights statutes exist which attempt to address other civil rights problems created by Roe v. Wade, and what relationship do they bear to the Civil Rights Act of 1964?

Enactment of a permanent ban on direct or indirect federal funding of abortion: What is the best means of getting the federal government out of the abortion business?

1. How extensive is the language of the bill?

   a) Does it cover only direct subsidy for abortions (i.e. Medicaid, federal employee medical benefits, and abortions paid for through foreign aid programs); or

   b) Does it include indirect subsidies as well? (e.g. abortions provided in buildings constructed or financed with federal funds [Hill-Burton], federally mandated attorney fees for abortion providers who sucessfully challenge state or federal abortion restrictions, federal research or training grants which study procedures or drugs which are used in abortion)

2. Does this bill, in fact, get the federal government out of the business of supporting abortion, either directly or indirectly?

I will now attempt to analyze the language of the bill with these considerations in mind.

The Language of S. 522

A. "Nothing in the Civil Rights Act of 1964 shall be construed to authorize the use of Federal financial assistance for abortions..."

Review of the cases decided since the Supreme Court's decision in Harris v. McRae, --U.S.-- does not reveal any cases where the Civil Rights Act of 1964 has been used as a device to force the use of federal financial assistance for abortion, but the legislative history of the Pregnancy Disability Act of 1979,[1], which was an amendment to Title VII of the 1964 Act[2] does reveal a concern that federal authority might be used to compel private employers to provide funds or insurance coverage for abortion in order to avoid liabilty under the sex-discrimination provisions of that Title. The language of the Pregnancy Disability Act is very specific:

> "This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion."[3]

The importance of the limiting provision in Title VII is that it illustrates the potential for federal compulsion to provide abortion funding, even while the federal government itself refuses to provide it. Thus, while the Civil Rights Act of 1964 may not mandate the expenditure of federal funds for abortion, federal law other than the Civil Rights Act of 1964 may mandate the expenditure of state or private funds for abortion. This is a gap in the language of the bill which should be corrected if the bill is to have any of its intended effects.

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[1] P.L. 95-598, Title III § 330, 92 Stat. 2679

[2] 42 U.S.C. § 2000e(k)

[3] 42 U.S.C. § 2000e(k)

The obvious current example of this problem is the regulation promulgated under Title IX of the Education Amendments of 1972,[4] which requires all "recipients" of federal funding to provide abortion "benefits" as a part of their general benefit and insurance programs, and to treat pregnancy and abortion as the same sort of temporary disability. This is precisely the reasoning rejected by the Congress when it passed the Hyde Amendment: pregnancy and abortion are not the same, for abortion takes the life of another human being. But Title IX forbids discrimination "on the basis of sex" in federally funded programs and federal regulators have taken it upon themselves to define sex discrimination to include refusal to treat abortion the same as pregnancy, even though Congress itself refuses to do so. This too is the use of federal civil rights law to fund abortion, only the funds are not federal; they are state or private.

I, therefore, recommend that language be added to the bill to provide, that "nothing contained in federal law shall be construed to authorize or require the use of Federal, state, local or private financial assistance for abortions...". Such a change would assure that federal law is "neutral" with respect to the limited issue of abortion funding.

B. ". . . and no such assistance shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

This language raises the direct/indirect funding question raised above. If the term "federal financial assistance" is to be interpreted as narrowly as the introductory comments would seem to indicate, then it is arguable that indirect funding would not be eliminated. This, unfortunately, is where the issue of direct/indirect assistance becomes a bit complex, so it will be useful to delineate precisely what I mean when I use the term "indirect" assistance. The Chairman's introductory remarks concerning the bill[5] correctly focus on the term "recipient" as the important operative term. He is quite correct when he says that under the Medicaid program, the hospital would not be considered to be a "recipient" of federal funds, although this would change were H.R. 700 [the so-called Grove City bill] to pass; for the state would be the recipient, not the hospital.

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[4] 20 U.S.C. § 1681, et seq

But Medicaid funding is not the only sort of federal financial assistance which is given to hospitals. They receive Hill-Burton funds, Public Health Service Act funds, and federal research funds. If such funds were to be used, for example, to pay for the facilities in which abortions were performed, the federal government would be providing a part of the total cost of the abortion, but it would do so only indirectly. By the same token, federal research and training program funds allocable to Ob-Gyn or genetic screening programs might be used to support or otherwise encourage abortions to be performed. These are all "costs" -- albeit indirect ones -- of abortion, and it is my view that the federal government should not subsidize them.[6]

Title VI and the Civil Rights of the Unborn

I applaud the Chairman's desire to see the civil rights of the unborn protected, and the use of Title VI is a singularly appropriate vehicle to do so, for it is the only one of the major cross-cutting civil rights statutes which has the flexibility to address all the civil rights questions which arose when the Supreme Court "federalized" abortion in 1973.[7] I disagree, however, that the bill really protects the civil rights of the unborn; for it cannot, simultaneously limit itself only to restricting federal funding of abortion, while asserting that it is a civil rights bill of the sort that President Reagan had in mind when he "ask[ed] you in Congress ... to move this year on legislation to protect the unborn."

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[5] Congressional Record, February 27, 1985, S. 2261-2262.

[6] Interestingly, it is not clear whether Section 4 of S. 46, which is considerably more specific than the bill under consideration here, would reach the construction funds issue. It would, however, reach the research and counselling questions.

[7] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973)

There are two reasons for taking this position: first, making "permanent" (i.e. as "permanent" as legislation can be) the prohibitions of the Hyde Amendment and extending them to all federally funded programs is a good first step, but it does not really protect the rights of either the unborn, or of the many citizens who object to the use of their tax dollars to fund this abhorrent practice. Second, limiting the coverage to federally financed abortions is arguably inconsistent with the structure of Title VI, not because abortion restrictions have no place in civil rights laws, but because the proposal does not go far enough.

Examination of each of the major cross-cutting federal civil rights laws, including Title VI, indicates that they prohibit discrimination in federally funded programs regardless of the source of the funds. Thus, it would be inconsistent with Title VI for a state to accept federal funding for its programs, and assert the right to continue discriminating as long as it could show that those who were guilty of discrimination were paid only with state funds. The only question under existing federal law would be whether those who were guilty of discrimination were participants in a "program or activity" receiving federal financial assistance. Strict bookeeping requirements would not be enough, nor should they be. If a state or private entity receives federal assistance directly,[8] there can be no excuse for discrimination. Thus, if the Congress really wishes to protect the civil rights of the unborn, it should also consider forbidding funding by any recipient. Only in this manner would the bill as currently written be truly consistent with the structure of Title VI.

Drafting the bill in such a manner would have several advantages, but would also be subject to criticism on federalism grounds. Because Senator

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[8] The direct/indirect distinction has been somewhat blurred in the context of the debate over amendments to Title IX. Direct subsidy by the federal government means that the recipient has a receives the funds directly from the federal government. Indirect funding means that the recipient uses the money in an indirect way to subsidize abortions (i.e. by subsidizing their indirect costs in a manner which would cause the price to the consumer of the services to pay less than their full cost. The term "indirect" emphatically does *not* refer to the type of indirect assistance which was at issue in *Grove City College v. Bell*, -- U.S. -- (1984), where the term was held to include a transfer of federal assistance from an ultimate recipient such as the debtor under a student loan or a Medicaid recipient.

Hatch addressed the federalism questions in the remarks which accompanied the introducation of the bill, (". . . it appropriately protects, within the bounds of Federal jurisdiction, the civil rights of the unborn.")[9] I will address them first.

The issue of federalism -- the bounds of federal and state authority -- is an important one lurking within the overall debate over the legality and wisdom of the Supreme Court's decision in Roe v. Wade. Wholly apart from the criticisms levelled at its decision on the substantive Fourteenth Amendment question -- whether the unborn are "persons" who are protected by the amendment -- there are important federalism questions as well; for there is nothing in the Constitution which says that the unborn may not be considered to be persons under the Fourteenth Amendment, and there is certainly nothing in the Constitution which denies the States the power to declare that the unborn are deserving of protection under the terms of their own constitutions. In other words, until Roe v. Wade abortion was not a federal issue, but it became one as soon as the Court decided to impose its will on all fifty states and the federal government.

The results of "federalizing" abortion have been disastrous, with unelected federal courts all over the country busily imposing their own views of morality and proper social policy on the states and the nation. Until McRae v. Harris,[10] federal and state courts were routinely compelling the expenditure of state and federal funds for abortion. Roe v. Wade continues to be ultimate basis of state cases compelling abortion funding, notwithstanding the refusal of state legislatures to provide the funds, and federal attorney fees statutes reward abortion providers and advocates for bringing cases challenging state laws and local ordinances which restrict or regulate abortion.[11] If the rights of the unborn are indeed a civil rights issue appropriately addressed under Title VI, the federalism concerns have already been addressed by the current structure of that statute.[12] More importantly, however, such an amendment to Title VI would raise the federalism question in a manner which is almost certain to reach the Supreme Court.

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[9] Congressional Record, February 27, 1985 at S. 2262, col. 1. (emphasis added)

[10] 448 U.S. 297 (1980)

[11] See, e.g., Akron Center for Reproductive Health v. City of Akron, No. C78-155 (N.D. Ohio, filed February 8, 1985) (awarding $368,709.76 to attorneys for abortion clinics).

The possibility that such an amendment would reach the Supreme Court for review is an advantage to such an approach which should not be underestimated. As I indicated previously, Roe v. Wade is the beginning and end of the federalism questions involving abortion. Any opportunity to force the Court to reconsider the central questions of that case should be utilized, and the potential in a broad ban on federal and state subsidy for abortion under the civil rights laws would have several advantages, including the possibility that a constitutional challenge to the law would reach the Court.

First, the bill would be a civil rights statute, which would come to the Court with a high degree of credibility. Second, it would rest for its validity under the Congressional spending power derived from Article I, Section 8 of the Constitution, a power which has been given an extremely broad reach by the Court. Unless the Court wishes to cut back on its currently expansive interpretation of the Congressional power to condition the expenditure of federal funds, it would have little choice but to put the States to the difficult task of determining whether federal largesse is more important to the particular "program or activity" than their desire to provide abortion funding as a part of that "program or activity". If it were to assert that the States could do as they wished within their own jurisdictions, it would certainly reassert the federalism principle, but at the expense of one of the central tenets of Roe v. Wade (i.e. that it is appropriate for there to be federal rules governing abortion). In either case, the Court would be put to a difficult choice in a nose-to-nose confrontation with a co-equal branch of the federal government exercising an express power conferred by the Constitution and which the Court itself has interpreted expansively. This, in my judgment, would be an excellent political trade-off for the time-consuming, but politically important, annual appropriations battles over abortion funding. More importantly, it would do what sorely needs to be done: to go beyond the current Hyde restrictions and to really get the federal government out of any aspect of the abortion business.

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[12] Were the structure of the statute to be modified in the manner suggested by H.R. 700, however, there would, in my view be substantial federalism questions raised, but discussion of those issues is far beyond the scope of this testimony.

Other Civil Rights Statutes Concerning Abortion

There are two major statutes which protect the rights of those who, for moral or religious reasons, refuse to participate in abortion. One has been mentioned already, 42 U.S.C. § 2000e(k), which protects private employers covered by Title VII of the Civil Rights Act of 1964 from the possibility that they might be forced to pay for abortions for their employees. As the House Report on that statute indicates, the Congress was "troubled . . . by any implication that an employer would have to pay for abortions not necessary to preserve the life of the mother through medical benefits or other fringe benefit programs, even if that employer . . . harbored religious or moral ojections to abortion; *such a requirement, it was felt, could compromise the religious freedom of such employers.*"[13] This provision would not be affected by the present bill.

The other important statute which recognizes the rights of conscientious objectors to abortion is 42 U.S.C. § 300a-7 which provides, in relevant part, as follows:

> (c) . . . No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health Education and Welfare, if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions. 42 U.S.C. § 300a-7(d).
>
> (d) No entity which receives, after the date of enactment of this paragraph, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental

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[13] House Rept. No. 95-948, "Civil Rights Act of 1964 -- Pregnancy Discrimination," 78-2 U.S. Code Cong. & Admin. News 4749, at 4755 (emphasis added).

Health Centers Act . . . may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions." 42 U.S.C. § 300a-7(e).

While this statute has a salutory effect, there are currently no regulations in force which define its scope or coverage. This is extraordinary for a civil rights statute intended to protect First Amendment rights. In addition, the California courts have construed the statute narrowly, and have ruled that a state university which had received over $244 million in fiscal 1981 was permitted to force conscientiously objecting students to contribute to the cost of other students' abortions through the Univerisity of California's health insurance program. Erzinger v. Regents of the University of California, 187 Cal.Reptr. 164, 137 Cal. App.3d 389, cert. den. 103 S.Ct. 3114 (1982). Not only is this an unnecessarily crabbed interpretation of the statute (the Court ruled that the statute means that students cannot be forced to take part in the physical performance of an abortion), it also points out how federal law can be used to force dissenters to pay for abortion. The trial court had noted that Title IX requires universities to provide insurance coverage for abortions,[14] and that to apply the federal protection to the dissenting students would place the University of California at risk of losing its federal funding. A classic example of the federal club being used to force dissenters into paying for abortions.

As a result, the Committee should consider making the protection currently afforded from coerced direct participation extend to indirect financial participation as well.

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[14] Whether the statute really contains such a requirement is open to serious question, but the regulations promulgated under that statute clearly do. 34 C.F.R. §§ 106.39, 106.40.

Conclusion

S. 522 is a step in the right direction, but it does not go far enough to be useful. Major revisions are needed to make it consistent with the structure of Title VI, and extend the ban on federal funding to both direct and indirect cost subsidies for abortion. In addition, consideration should be given to including language which would clear up the direct/indirect participation issue which has arisen under 42 U.S.C. § 300a-7.

Thank you for your attention.

Senator HATCH. Before introducing our next witness, let me place in the record, without objection, a memorandum entitled "Abortion and the Supreme Court." This memorandum states that after the Federal Government virtually ended the Federal funding of abortion in Texas, the rate of abortions among Medicaid eligible women dropped 35 percent, in Ohio 23 percent, and in Georgia 18 percent. The Center for Disease Control projected perhaps 25 to 30 percent of the indigent women seeking abortion were instead continuing their pregnancies after the Hyde amendment.

In 1977, the Center for Disease Control predicted that thousands of poor women would turn to illegal abortions. CDC physicians also predicted that between 44 and 90 women would die within the year from botched illegal abortions; yet, the center's preliminary figures released the following year showed that the predictions were simply inaccurate.

In the words of Dr. Willard Cates, Jr., head of the center's abortion surveillance project, "Our numbers do not show that there has been a mass migration to illegal procedures."

Without objection, I would also add for the record an article which appeared in the Washington Post a few weeks ago by Doris Gordon, the National Coordinator of Libertarians for Life.

[The memorandum and article referred to follow:]

March, 1984

ABORTION AND THE SUPREME COURT

WHAT THE COURT ACTUALLY SAID

On January 22, 1973, the U.S. Supreme Court in two separate decisions (*Roe* v. *Wade* and *Doe* v. *Bolton*), ruled that any state abortion law in the future would have to meet the following guidelines.

FIRST TRIMESTER

During the first three months of pregnancy, the state must leave the abortion decision entirely to a woman and her physician.

SECOND TRIMESTER

During the second three months, the state may only enact laws which regulate abortions in ways "reasonably related to maternal health." This simply means that a state may determine who is qualified to perform the abortion and where such an operation may take place. The state may not, however, enact laws which safeguard the lives of the unborn. (On June 15, 1983, the Court in *City of Akron* v. *Akron Center for Reproductive Health, Inc.* ruled that it wasn't "reasonable" to limit second trimester abortions to hospitals.)

THIRD TRIMESTER

After the woman's sixth or seventh month of pregnancy, the law may forbid her to have an abortion that is not determined to be necessary to preserve her "life or health"[1] (emphasis supplied). The Court went on to define the word "health" in such broad terms - i.e., social well-being - as to make it virtually impossible for a state to protect the unborn child even after the sixth or seventh month of pregnancy.[2]

Thus, the justices of the Supreme Court, disregarding prior legal tradition, overwhelming biological evidence and the ethical traditions of a majority of the American people, struck down the abortion laws of all 50 states (even the most permissive at the time) and made abortion on demand, at every stage of pregnancy, the law of the land. On January 22, 1973, the Court gave the United States the dubious distinction of having the most permissive abortion law of any nation in the western world. On June 8, 1982, the Senate Judiciary Committee published its report (No. 97-465) on the Human Life Federalism Amendment, and concluded that "As a result of the *Roe* decision, a right to abortion was effectively established for the entire term of a pregnancy for virtually any reason, whether for sake of personal finances, social convenience, or individual life-style....the Committee observes that no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy."

THE RAMIFICATIONS OF THE COURT'S DECISIONS

The consequences of these decisions have been nothing short of disastrous.

UNBORN CHILDREN

Predictably, the number of unborn children killed by abortion increased dramatically as abortion became much more available and as the teaching effect of the law took hold. More than 1.55 million unborn children are now legally aborted each year in the United States.[3] Over 14 million have been killed during the eleven years since the Supreme Court decisions of 1973. Planned Parenthood estimates that this number should ultimately level off at 2.4 million unborn children being aborted every year in the United States.[4] The Center for Disease Control's Abortion Surveillance Report for 1980 (issued May, 1983) indicated 10% of abortions were performed after the third month of pregnancy; this represents 155,000 abortions.[5] Hundreds of these babies actually are born alive following the abortion; a few develop normally, but most die due to prematurity and the violence to which they have been subjected.[6]

MARRIAGE AND THE FAMILY

But the Court did not stop with the unborn. In subsequent rulings, Planned Parenthood of Central Missouri v. Danforth (6/1/76), Bellotti v. Baird (7/2/79) and City of Akron v. Akron Center for Reproductive Health (6/15/83),[7] the Supreme Court carried this massive but legal assault to the institution of marriage and the structure of the family.

HUSBANDS

As a result of the Danforth ruling, a wife may obtain an abortion without her husband's consent and in most instances, even without his knowledge.[8] The husband now is likely to have no right to notice, to a hearing, or to anything at all if the child which both have created and which both are bound to support is to be destroyed at the mother's wish.

This stands in contrast to the fact that the husband

- Shares jointly in the creation of his child;
- Has a right to adopt his own child conceived out of wedlock;
- Has a right to notice of a hearing if a child is to be taken from him by his wife.[9]

PARENTS

Another result of the Court's ruling in the Danforth case is that all state laws requiring the parents' consent before an abortion is performed on their minor daughter are now invalid. This ruling stands in vivid contrast to the fact that most states require parental consent before a minor child may leave home, marry, get a job, undergo surgery, attend adult movies, or get her ears pierced.

In the Danforth ruling the Supreme Court disregards the parents' natural interest in:

- Their daughter's physical and emotional health;
- Their daughter's conduct and formation of conscience; and
- Their grandchild.[10]

WOMEN

Increasingly, women are being coerced into the violence of killing their unborn children by a society which leads them to believe that abortion is the solution to a personal or social problem. In most instances, those who advocate abortion as a "woman's choice" do not wish for women facing difficult pregnancies to be informed of the development and humanity of their unborn children, of the nature of an abortion, of the dangers posed by abortion to the woman's physical and mental health, or of the assistance which is available to pregnant women who carry their children to term.[11] The Court's 1983 Akron decision prevents states from enacting such "informed consent" laws.

MEDICAL PROFESSION

The role of the physician in our society has been re-defined in the aftermath of the Roe and Doe decisions of 1973. Now doctors are not only the protectors of life, but the destroyers of life as well. Physicians who perform abortions defy their own professional oath, the ancient Hippocratic oath, and its modern language version, which states that they "will maintain the utmost respect for human life, from the time of its conception".

THE RECLASSIFICATION OF HUMAN BEINGS: PERSONS & NONPERSONS

Perhaps the ultimate arrogance and ultimate threat of the Court's rulings on abortion lies in the very premise on which the Court based those rulings. The

Court stated, paradoxically, that while it did not have to determine when human life begins, it could, nevertheless, make the determination that "the word 'person' as used in the 14th Amendment, does not include the unborn."[12] This ruling was based on the Court's contention that "the unborn have never been recognized as persons in the whole sense"[13] (emphasis supplied). By claiming to remain neutral on the question of "when human life begins" the Court effectively declared the simple possession of biological human life irrelevant or insufficient for determining personhood and thus for determining who is to be protected under the Constitution and the laws of the United States. Later the Court declared that the state had no interest in protecting human life inside the womb until the fetus is capable of "meaningful life" outside of the womb.[14] These judgments by the Court demonstrate that, far from remaining neutral on the question of when human life begins, the justices pled ignorance and then doomed the unborn by ruling them to be incapable of "meaningful life." Clearly these rulings give the state enormous power - the power to determine the definition of what constitutes "meaningful life". The Declaration of Independence says that all men are endowed by their Creator with the inalienable right to life. For the present, this ideal, which is incorporated into the Constitution of the United States as a fundamental freedom, does not apply to unborn children.

"All of our constitutional liberties are nothing if we can be defined out of the human species. In Dred Scott v. Sanford, the Supreme Court declared that the decendant of African slaves could never be a citizen of the United States, but even that most dreadful of decisions did not carry so far as Roe and Doe. These decisions, as now interpreted by the courts, arrogate to the courts the power to decide who is human."[15] (emphasis supplied)

More than a million and a half unborn children legally killed by abortion annually, the institutions of marriage and the family subverted, the "unmaking of human beings" so that they can be removed from the protection of the law - all are results of the U.S. Supreme Court rulings on abortion. What can be done about them?

A CONSTITUTIONAL AMENDMENT IS NECESSARY

The Supreme Court rulings on abortion must be overturned. This can be achieved in one of two ways: the Court can reverse itself; or Congress, with the states, can amend the Constitution.

The first of these possibilities is considered highly unlikely for the followings reasons:

1) The Supreme Court and many lower federal courts have not only consistently applied the holdings of Roe v. Wade and Doe v. Bolton, they have actually expanded them. Immediately following the Supreme Court's abortion rulings of January 1973, several states passed anti-abortion statutes in an effort to provide some degree of protection to the unborn, to protect the rights of parents and husbands, and to assure some degree of informed consent for women. The Court, however, has subsequently held all these efforts to be unconstitutional.[16] Rhode Island's state legislature attempted to define the unborn child as a person but was told by a federal court that its action was unconstitutional under Roe v. Wade.[17] Some states have passed legislation requiring physicians attending late-term abortions to provide care for those unborn children who survive the procedure. But they have been told by a least one federal court, applying Roe v. Wade, that such an action is unconstitutional.[18]

   The Court has been consistent and unmistakable in its steadfast support for and application of the Roe and Doe decisions. As Supreme Court Justice John Paul Stevens said in 1976, Roe v. Wade is "now part of our law."[19] Some Court observers saw the Court's ruling in Maher v. Roe, where the Supreme Court concluded that it is constitutional for a state, and by implication the federal government, not to fund abortions, as a "retreat." The Court itself noted: "Our conclusion (in Maher) signals no retreat from Roe (i.e., Roe v. Wade) or the cases applying it."[20] And in the 1981 H.L.V. Matheson parental notification decision and the 1983 Akron decision, the Supreme Court reaffirmed its Roe v. Wade decision.

2) Some have suggested that the Court could reverse itself in the future and that those who oppose the Supreme Court's abortion rulings should wait for the membership of the Court to change and hope that the new appointees are less committed to the abortion rulings. Changing the composition of the Court, however, is a long and slow process requiring years to achieve. Even then, there is no certainty that future members of the Court will be any more opposed to the abortion cases than are its present members. In the meantime, a "detente" of sorts would have been declared with the new Court-established abortion laws; the unborn would continue to be left unprotected; and abortions would continue to expand at an alarming rate, becoming an even more accepted part of the fabric of American society.

Thus, in order to correct the errors of the U.S. Supreme Court, a constitutional amendment, while difficult to achieve, must be pursued. Moreover, it is a more democratic and permanent means of improving the law. Everything short of an amendment has been tried and has failed. The law must be made unmistakable in its protection of the unborn.

BUT SHOULD WE TAMPER WITH THE CONSTITUTION?

Some have suggested that amending the Constitution to correct an error by the Supreme Court is to "tamper" with the basic and fundamental law of the land. On the contrary, the amending process itself was designed to clarify our freedoms and rights and to prevent any branch of government from subverting them (as the fundamental right to life has been undermined by the Supreme Court rulings on abortion).

Nor is a constitutional amendment to eliminate an error by the Court unprecedented. A constitutional amendment has been used four times in the past to overturn rulings by the Supreme Court.

The 11th Amendment to the Constitution, prohibiting federal judicial power to be exercised in suits by citizens of a state against another state, came in direct response to an action of the Supreme Court in accepting jurisdiction over such a case. (Chisholm v. Georgia)[21]

The 14th Amendment, in circumstances not dissimilar from the present case, was proposed to the Constitution following the infamous decision of the Supreme Court in the Dred Scott case finding that Black individuals were nonpersons under the Constitution.[22]

The 16th Amendment, permitting the imposition of a federal income tax, was later enacted in response to a Supreme Court decision finding an unapportioned-by-state tax to be in violation of Article I of the Constitution. (Pollock v. Farmer's Loan and Trust Co.)[23]

Finally, the 26th Amendment, according 18-year-olds the right to vote in federal and state elections, was proposed following the Court's decision that the Congress lacked authority to impose such an obligation statutorily upon the states. (Oregon v. Mitchell)[24]

WHAT A HUMAN LIFE AMENDMENT (HLA) WOULD ACCOMPLISH

Advocates of abortion allege that if a Human Life Amendment is adopted, the same number of women will obtain abortions and large numbers of women will die from these illegal procedures. There is no factual basis for either of these allegations.

A HUMAN LIFE AMENDMENT WOULD REDUCE ABORTIONS

A) REASON FOR FEWER ABORTIONS:

1. THE LAW AS TEACHER

It was Supreme Court Justice Louis Brandeis who observed in 1928 that, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[25]

ITEM: A study conducted of 600 French women who requested abortion through a public welfare center in the Paris area.

> According to Dr. Greg Marauni, Scientific Secretary of the Association of the Study of Child-birth Problems, 40% of these women said they would not have had an abortion if the government had not relaxed the previously-restrictive abortion law.[26]

> ITEM: During 1976, a Florida obstetrician interviewed 300 of his patients who previously had had legal abortions. The majority said that they would not have obtained an abortion if it had been illegal. They tended to equate legality with what is "right and safe."[27]

A Human Life Amendment to the Constitution would substantially reduce the number of abortions being performed because the law plays an inherently educative role in terms of developing the social ethic of a society. The Supreme Court, in its 1973 decisions, elevated abortion to a constitutionally protected priviledge and eliminated all legal safeguards for the unborn. By establishing a new social ethic favorable to abortion and by preventing states from prohibiting abortion, the Court's decisions have led hundreds of thousands of women to obtain an abortion, who would not otherwise have done so. A professor of law at the University of California at Berkeley recently observed:

> ...the Supreme Court, like the Constitution itself, is a teacher of morals. When it pronounces conduct to be legal, a majority of Americans often understand it to say that the conduct is right. When the Court says an act is a constitutionally protected liberty, many Americans read it to say that the act is a constitutionally privileged good.[28]

The Supreme Court has legalized the destruction of the unborn by abortion. Many Americans are understanding it also to be good and correct conduct.

2. LAW WOULD LIMIT ACCESSIBILITY TO ABORTIONS

Rendering abortions illegal would eliminate all public funding for them, and stop the massive number of hospitals and clinics throughout America performing legal abortions. Planned Parenthood itself, in its Family Planning Perspectives publication (Sept./Oct. 1978 and Jan./Feb. 1981), admits that making abortions geographically and financially inaccessible dissuades many women from obtaining them.

3. LAW WOULD END THE ACTIVE COMMERCIAL PROMOTION OF ABORTION

The active promotion and "selling" of abortion in the marketplace would necessarily end with the abolition of legalized abortion. This would include yellow page listings, billboards and other similar sources of public information which unrestrictedly advertise the easy availability of abortions.

B) EXPERIENCE OF LAW'S IMPACT

1. EUROPEAN EXPERIENCE

Every country in the world that has restricted abortions, following a period when they were easily obtained, has found that the total number of abortions decreases and the birth rate increases. This has happened in the German Democratic Republic, Denmark, Sweden, Hungary, Rumania and the Soviet Union.

Studies from Denmark, Sweden and Norway support this point. Dr. Robert E. Hall, an obstetrician/gynecologist at Columbia University (and a leader in the pro-abortion movement), commented as follows on a Denmark study: "The state of the turned-down applicants (for abortions) is noteworthy - only 16% illegally aborted."[29] A Swedish study found that 86% of 249 women who were refused abortions eventually gave birth to their children, and only 11% obtained illegal abortions.[30] An earlier Swedish study of 344 women whose requests for legal abortions had not been approved, found over 85% giving birth to their children.[31] In Norway, a study conducted during the mid-1950s found an illegal abortion rate of approximately 11% for women refused legal abortions.[32]

The most dramatic example of the impact of restricting abortion after a period of little or no restriction is Rumania. In 1966, following a decade when Rumania's abortion law had been permissive and the birthrate stood at 14.3 per 1,000 population, the law was made more restrictive. The following year, 1967, the birth rate went from 14.3 per 1,000 population to 38.4. The number of actual births rose from 273,000 in 1966 to 522,900 births in 1967.[33] The birth rate has since gradually declined, but as of 1971, it was still higher (17%) than in 1966.[34]

2. U.S. EXPERIENCE WITH HYDE AMENDMENT

After the federal government virtually ended the federal funding of abortions, an analysis was conducted in four states in 1978 to determine its impact on the number of abortions and births. In Texas, the Center for Disease Control found the rate of abortions among Medicaid-eligible women dropped 35%. The Alan Guttmacher Institute, an affiliate of Planned Parenthood of America, found a 23% drop in Ohio and an 18% drop in Georgia. In New Jersey, a 30% increase in births occurred.[35] The Guttmacher Institute estimated that if all public funding of abortion ceases, 20-25% of the indigent women seeking abortions will instead bear children.[36] And the Center for Disease Control projected perhaps 25-30% who are continuing their pregnancies because they cannot afford a legal abortion.

C) PROJECTED NUMBER OF UNBORN LIVES THAT WOULD BE SAVED

If an HLA is adopted, the overall number of abortions will decline - and markedly so. This is the conclusion of Dr. Christopher Tietze of the pro-abortion Population Council, who estimated in 1976 that if an amendment were adopted and reasonably enforced, there could be as many as 500,000 fewer abortions performed every year.[38] That percentage today would mean 50% or 750,000 fewer abortions. (Dr. Tietze is the Associate Director of the Population Council, Biomedical Division. He is considered one of the world's foremost biostatisticians and is the leading authority on abortion statistics.) If we used the aforementioned foreign experience as the guide, then, the number of lives saved would be as high as 86% or 1,333,000 annually.

A constitutional amendment, restoring the right to life to the unborn, is a necessary first step toward achieving a society more respectful of unborn human life, toward legally dissuading persons from having abortions, and thus, toward saving hundreds of thousands of lives annually.

A HUMAN LIFE AMENDMENT WOULD NOT JEOPARDIZE MATERNAL LIFE OR HEALTH

A) LEGAL ABORTION HAS NOT IMPROVED MATERNAL MORTALITY OR HEALTH

Because the advocates of abortion on demand have argued so long and stridently that permissive abortion policies are necessary to reduce the number of deaths from illegal abortions, many in our society have come to believe that this is, in fact, the case. But maternal mortality generally, and abortion-related maternal mortality specifically, have exhibited a steady decline for the last several decades. For instance, in 1942, 1,231 women died from abortion. In 1952, 320 women died from abortion, and by 1969, the number of deaths was down to 128.[39] This dramatic decline occurred during a period when practically every state had a very restrictive abortion law! For this reason it is assumed that improvements in health care are chiefly responsible for the decline.

This decline in abortion-related maternal deaths continued after the Supreme Court decisions on abortion. But it was expected to continue, whether the Court acted or not, following a pattern that had been well established over the preceeding three decades.

According to a leading U.S. obstetrician, writing in the February 1, 1978 issue of The American Journal of Obstetrics and Gynecology, "There has been no major impact on the number of women dying in the United States since liberalized abortion was introduced." In fact, he continues, "...there has been less improvement in maternal mortality in the 1973-to-1975 period than in any other two-year period since 1965. This suggests that approximately one million (now over 1 1/2 million) fetuses are being sacrificed each year with no evidence that it is contributing significantly to the reduction of maternal deaths in this country."[40]

In 1977, when legal abortions reached 1,320,000, the decade's downward trend in abortion maternal deaths reversed. The number of abortion maternal deaths has subsequently maintained a higher level through 1981 (last year for which data is currently available).[41]

With respect to maternal health, the total number of abortion complications treated in U.S. hospitals has increased since the legalization of abortion on demand.

In 1969, the number of abortion-related complications being treated in U.S. hospitals stood at 9,000; by 1979, the number had risen to 34,500.[42]

B) EXPERIENCE OF HYDE AMENDMENT

When a strict federal ban on the use of federal funds for abortion went into effect in August, 1977, the Center for Disease Control (CDC), a government agency, predicted that thousands of poor women would turn to illegal abortions. CDC physicians further projected that as a result of the cutoff, "between 44 and 90 women would die within the year from botched illegal abortions."[43] Yet the Center's preliminary data which was released in February, 1978, following the fund cutoff, showed that the "blood bath" many predicted simply has not occurred. "We're delighted we have not seen it," said Dr. Willard Cates, Jr., head of the Center's abortion surveillance branch and one of those to make the death projections. "...our numbers don't show that there has been a mass migration to illegal procedures."[44]

On April 1, 1979, the Ob. Gyn. News carried an article entitled "No Excess Deaths Follow Medicaid Cutoff of Abortion," and quoted Dr. Willard Cates as saying "Original projections by the CDC that the cutoff of Medicaid funding for abortions would result in 5-90 excess abortion-related deaths annually have not proved true." In November, 1980, the CDC reported on yet additional studies and concluded that restricting public funds for legal abortion: (a) "...has not increased the number of illegal abortions," (b) had "...no significant change in the number and proportion of publicly funded hospitalizations for complications of illegal...abortions, and (c) resulted in "...a marked decrease in publicly funded hospitalizations for complications of legal abortions."[45]

ABORTION IS MANY ISSUES

The Supreme Court rulings on abortion go well beyond the issue of whether the abortion procedure will or will not be allowed in the United States. These rulings involve:

THE POWER OF THE COURT: Should the Court be the one who decides what is meaningful life and who among us has meaningful life?

THE ROLE OF GOVERNMENT: Should the government's task be to protect life or to take an active part in reducing the population by permitting and paying for abortion?

THE FUNCTION OF THE PHYSICIAN: Should the physician be a healer only, or should he also kill?

THE STATUS OF MARRIED PERSONS: Should married persons be a unit specially recognized by the law, or are they two individuals with no more rights and privileges than single persons?

THE ROLE OF PARENTS: Should parents have particular responsibilities for the mental, physical and moral welfare of their children, or are minor children free to make their own decisions about procreating offspring and having abortions?

These are questions that go to the the heart of our society. Malcolm Muggeridge put it best when he said that the abortion issue is so central to what it means to be a human being that how it is decided will determine whether our society is to be seen "as a family with a loving Father who is God, or as a factory-farm whose primary consideration must be the physical well-being of the livestock and the material well-being of the collectivity."[46]

To take a stand, then, in support of a Human Life Amendment to the Constitution is to participate in the shaping of the society which the next generation will inherit. The question that each of us must ask ourselves now is whether we will take a stand, or let those with narrower goals and less humane aims determine the future direction of our society.

NOTES

1. The Supreme Court, in Roe v. Wade, 410 U.S. 113 (1973), stated:

   (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

   (b) For the stage subsequent to approximately the end of the first trimester, the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

   (c) For the stage subsequent to viability, the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother.

   Id. at 164-65. *See also* Noonan, "Why a Constitutional Amendment?," I *Human Life Review*, 26 (Winter 1975):

   > Confusion has persisted as to what the Court actually decided in *Roe* and *Doe*...the Court did not decide that at the end of the second trimester the child in the womb could, in some fashion, be protected - it expressly said that viability, when a species of protection could be given, was "usually placed at seven months" (emphasis supplied). The Court did not say that the child after seven months had the rights of a person - it expressly said that "the unborn have never been recognized in the law as persons in the whole sense" (emphasis supplied). The Court did not hold that after seven months, the state could prohibit abortion - it expressly held in *Roe* that a prohibition even in the last two months of pregnancy was subject to exception in favor of "the life or health of the mother" (emphasis supplied).

   Id., at 28-29.

2. *Doe* v. *Bolton*, 410 U.S. 179 (1973):

   > "...the medical judgment may be exercised in light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs...", 410 U.S. at 192.

   Roe v. *Wade*, 410 U.S. 113 (1973):

   > Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be iminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

3. Planned Parenthood - Alan Guttmacher Institute, *Family Planning Perspectives*, (January 1982).

4. On October 7, 1975, the Planned Parenthood Federation of America called for "up to one million" additional abortions annually in the United States. Referring to the 892,000 legal abortions performed in 1974, Planned Parenthood estimated a "need" for up to 1.8 million abortions that year. News Release, Planned Parenthood Federation of America, N.Y., N.Y., Oct. 7, 1975. *See also*, Tyler and Schneider, "The Logistics of Abortion Services in the Absence of Restrictive Criminal Legislation in the United States," 61 *American Journal of Public Health* 491 (March 1971).

5. U.S. SEPARTMENT OF HEALTH & HUMAN SERVICES, CENTER FOR DISEASE CONTROL, *Abortion Surveillance*: 1980, issued May 1983, p. v.

6. At least two court cases have already resulted from allegations that live babies, who were born after an abortion, died later or were killed.
In Floyd v. Anders, 440 F. Supp. 535 (D.S.C. 1977), a physician was accused of violating the South Carolina abortion statute when he performed an abortion on a woman who was 25 weeks pregnant. The baby survived the abortion and lived in the hospital nursery for twenty days following the abortion, which had been performed because the mother wanted to attend college. The case is on appeal to the U.S. Supreme Court. In People v. Widdell, No. C37815 (Cal. S. Ct., mistrial declared May 5, 1978), a California physician was accused of strangling, in the hospital nursery, an infant who was allegedly born alive following a late-term abortion the physician had performed. The mother had obtained the abortion because she did not want to embarrass her father, a local high school principal. The new trial in November, 1978, was subsequently dismissed. See also Newsweek, April 3, 1978, p. 35 and; Phila. Inquirer, August 2, 1981.
7. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); City of Akron v. Akron Center for Reproductive Health, Inc., S.C. No. 81-746, June 15, 1983.
8. Id.
9. Id. See also Noonan, "The American Context," 3 Human Life Rev. 28 (Winter 1977).
10. Id.
11. On February 28, 1978, the City Council of Akron, Ohio, adopted an ordinance that contains a detailed informed consent provision. Among other things, the ordinance requires that a woman seeking an abortion be informed of the biological development of her unborn child and of the potentially severe consequences of abortion, both physiological and psychological. Women must also be told of the alternatives to abortion and be provided a list of agencies where a woman can get assistance should she decide not to have an abortion. The ordinance was opposed by local abortion clinics, as well as by Planned Parenthood, the American Civil Liberties Union, the National Abortion Rights Action League (NARAL) and other groups supporting unrestricted access to abortion. The Supreme Court declared these provisions of the Akron law unconstitutional on June 25, 1983.
12. 410 U.S. at 158.
13. Id. at 162.
14. Id. at 163.
15. Noonan, "A New Constitutional Amendment," 1 Human Life Review 26, 32 (Winter 1975).
16. 428 U.S. 52 (1976); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973).
17. Doe v. Israel, 358 F. Supp. 1193 (D. R.I. 1973), cert. denied 416 U.S. 993 (1974)
18. Planned Parenthood Assoc. v. Fitzpatrick, 401 F. Supp. 554 (E.D.Pa. 1975), appeal docketed sub nom. Beal v. Franklin, 46 U.S.L.W. 3555 (U.S. March 7, 1978) (No. 77-891).
19. 428 U.S. at 101 (Stevens, J., dissenting).
20. Maher v. Roe, 432 U.S. 464, 475 (1977).
21. 2 U.S. 419 (1793).
22. 60 U.S. 393 (1857).
23. 157 U.S. 429 (1805); 158 U.S. 601 (1895).
24. 400 U.S. 112 (1970).
25. Olmstead v. United States, 277 U.S. 438, 485 (1928), (Brandeis, J., dissenting).
26. Stevenson, N.C. News (Paris), February 18, 1977.
27. National Right to Life News, December 1976.
28. Noonan, "The Law as Teacher," 3 Human Life Review 8, 15 (Summer 1977).
29. Dr. Robert E. Hall, Ob/Gyn at Columbia University and a leader in the pro-abortion movement, commented in Abortion and the Law, that in Denmark, "the fate of the turned down applicants (for abortion) is noteworthy - only 16% were illegally aborted." (Smith, D., ed., Western Reserve Press, Cleveland, 1967, pp. 232-233.)
30. Book, "Refused Abortion: A Followup Study of 249 Women Whose Applications Were Refused by the National Board of Health in Sweden," Acta Psychiatric Scand., 39 Supplement 168 (1963). See also, Callahan, Abortion: Law, Choice and Morality, p. 85.
31. Lindbert, Bengt F., "What do Women do When the Psychiatrist Says No to Their Application for Abortion?," 45 Svenska Lakarlednengers (Stockholm 1948), 1381-1389. See also, Callahan, p. 76.
32. Hultgren, G., "Avslag pa ansokan on legal abort.," Nordish Medicin, 62 (1959), p. 1182. See also, Callahan, pp. 76-77.
33. Callahan, p. 235.
34. U.S. CENSUS BUREAU, WORLD POPULATION DATA DIVISION, 3/6/84.
35. N.Y. Times, 1/11/79, p. B6.
36. N.Y. Times, 7/1/80.

37. Ob. Gyn. News, 4/1/79, p. 3.
38. Personal communication with Christopher Tietze, February 23, 1976. See also, Tietze, "The Effect of Legalization of Abortion on Population Growth and Public Health," 7 Family Planning Perspectives, 123-27 (Issue 3, May-June 1975).
39. Vital Statistics of the United States, Vol. II - Mortality.
40. Denis Cavanagh, M.D., F.A.C.O.G., F.A.C.S., Department of Obstetrics & Gynecology, U. of S. Florida, College of Medicine, Letter to the American Journal of Obstetrics and Gynecology, February 1, 1978, pp. 374-5.
41. Mortality Branch, National Center for Health Statistics, Hyattsville, Maryland, 3/6/84.
42. Hospital Record Study, a joint publication of the Commission on Professional and Hospital Activities in Ann Arbor, Michigan and IMS America, Ltd., Ambler, Pennsylvania (1969-1979).
43. American Journal of Public Health, A.P., 9/28/77.
44. Washington Star, February 16, 1978. The Center for Disease Control received weekly reports on abortion-related maternal mortality and morbidity from 24 hospitals around the country.
45. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTER FOR DISEASE CONTROL, Abortion Surveillance, 1978, issued November 1980, p. 14.
46. Muggeridge, Malcolm, "What the Abortion Issue is All About," ! Human Life Review 4, (Summer 1975).

WASHINGTON POST HEALTH/MARCH 20, 1985

Second Opinion

On the Abortion Issue, Technology Works Both Ways

By Doris Gordon

In her article, "Because of Technology, Abortion Is Here to Stay" [Second Opinion, Feb. 27], Beryl Lieff Benderly argues that advances in technology would make ineffective any attempts to ban abortion. However, as she failed to note, there are also technological advances that are having an impact against abortion, for they are helping us in getting to know the preborn.

Interestingly, Ms. Benderly mentioned Dr. Bernard Nathanson, atheist (I am, too), former abortionist and "pioneer in legal abortion." In the film "The Silent Scream," he says: "When I was a medical student in 1949, we had no such science as fetology. We were taught that the unborn child, the fetus, was something in the uterus. But it was really an article of faith as to whether or not it was a human being, and whether or not that human being had any unique personal qualities."

Nowadays Dr. Nathanson is fighting to outlaw abortion. It was the insights he gained from new technology, he says, that led him to change his views.

Today we see movies on television about life before birth. Children can be given pictures of themselves taken months before birth, even at fertilization for those conceived in vitro. Ultrasound imaging enables us to see them in the womb sucking their thumbs—or being dismembered by abortion. The preborn have been operated on in and out of the womb. Doctors can observe and treat them with such techniques as fetoscopy, amniocentesis, hysteroscopy and electronic fetal heart monitoring. Many now acknowledge they have two patients: the mother and her child.

We now know there is human consciousness in the womb, that we begin to learn and experience emotions there. This isn't surprising, for the foundation for the brain, spinal cord and entire nervous system is established by 2½ to 4 weeks. Electrocardiogram (EKG) and electroencephalogram (EEG) recordings can be made by then, and reflexes can be elicited, too.

Researchers are working on embryo transplants and artificial wombs. Women who are uncomfortable with abortion but who don't want to carry a child to term may one day be able to end their pregnancy but allow the child to grow to term through one of these other methods. They could then treat their preborns like newborns, who, if unwanted, are not usually killed but given to others.

Technology, then, is working both ways. It's making it easier to abort, but it's also leading more of us to question whether this is acceptable. To begin with, nobody likes abortion. The inconsistency of struggling to save one preborn but then killing another perhaps older one, as some doctors do, is causing many to reconsider whether abortion is truly a right under justice.

As a libertarian, I took special note of Ms. Benderly's comments on rights. She talked of "the futility of laws forbidding people to buy what they deeply want." Yes, government shouldn't restrict peaceful actions in the marketplace. But wanting to do something does not necessarily mean we have a right to do it. If a killing or any other action is aggression, there is no right to do it, and it should not have the protection of the law.

Moreover, banning abortion is not quite as futile a gesture as she seems to think. Laws, in themselves, don't prevent any crime, yet they help influence choices. If an action is aggression, a law puts us on notice that it will be condemned rather than permitted. True, outlawing abortion won't change some minds, but others will be deterred from aborting, especially those with doubts.

She mentioned the "involuntary servitude of undesired motherhood" argument. It would have merit if the preborn were not persons, for it would be like someone is forcing you to keep a pet. But given that the preborn are persons, taking care of them is not servitude. For it's not servitude to take care of one's children. It's not involuntary, either, barring rape, because the parents get into the situation voluntarily. Children don't impose it upon their parents; it is the children who are in the situation involuntarily.

No technology, old or new, can resolve philosophical and ethical questions. Technology can show, for example, whether the preborn feel pain; but steers feel pain, too, yet we kill them. So pain is not a sufficient test of whether the entity has rights. Technology cannot answer such questions as: Do we have a right to inflict pain and death? Do life and rights coexist, or are there two classes of human beings—those with rights and those without?

Biology says the preborn are human beings, Homo sapiens, but are the preborn persons, and if so, does this matter? If in doubt, should we be free to kill them anyway? Do parents have the obligation to protect their children, born and preborn, from harm? Or do they have a right to harm them?

What is "a person"? Technology can't give the criteria we need to answer this, but it can give evidence as to whether the preborn fit those criteria. And technology seems to be personalizing them.

So it's not enough to say, as Ms. Benderly did, that outlawing abortion "would deprive women of a right." One must also show that either the preborn are not persons, or given that they are, why nevertheless there is a right to kill them.

The Supreme Court, in *Roe v. Wade*, never came to grips with the critical question of the person. Far too many articles on abortion don't even raise the point. Ms. Benderly's article, for example, never even mentioned the preborn. She mentioned "a flexible tube to empty the womb," but what is it that is being sucked out?

"The moving finger of technology has written," she wrote, "and there is no going back to anyone's fantasy past." I say treating the preborn as if they are at most only "something" is the fantasy. And technology is helping to give the lie to that. ■

Doris Gordon of Wheaton is national coordinator of Libertarians for Life.

Second Opinion is a forum for those who wish to express a point of view on a health-related topic. Send articles to Second Opinion, Health Section, The Washington Post, 1150 15th St. NW, Washington, D.C. 20071.

Senator **Hatch**. I am pleased to have had your testimony, Professor Destro

We will now turn to our final witness, who has often appeared before the Senate Judiciary Committee on many important issues. Althea Simmons is the director of the Washington Bureau of the National Association for the Advancement of Colored People, and we welcome you to the committee again, Mrs. Simmons, and we will take your testimony at this time.

STATEMENT OF ALTHEA T.L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Ms. **Simmons**. Thank you, Mr. Chairman. I would like to ask the indulgence of the committee to allow me to submit a corrected copy of my testimony.

Senator **Hatch**. Without objection, we will place that in the record.

Ms. **Simmons**. The distinguished panelists have indicated what they brought to this hearing. Let me say, Mr. Chairman, that I bring to this hearing a lifetime of being discriminated against on the basis of race, so I have very strong feelings about racial discrimination.

I am here today to appear on behalf of our national organization with 2,100 branches, youth councils and college chapters, to oppose S. 522 as an amendment to the Civil Rights Act of 1964. We believe, Mr. Chairman, that title VI is the wrong vehicle for this issue.

The NAACP has no position on abortion and the myriad issues inherent therein. However, the NAACP, as you can well imagine, takes very strong issue with redirecting the meaning and purpose of title VI of the 1964 Civil Rights Act away from a national affirmation of the policy and constitutional mandate opposing racial and national origin segregation.

The Congress correctly has used its awesome spending power to redress a societal wrong and we support this use of legislative power. Title VI, however, involves more than one constitutional mandate. It specifically and expressly was passed to ensure that Federal assistance would not be used to support even the vestiges of our past as a slave-owning nation.

Section 601, which has been called the heart of title VI, says, very simply:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 601 sets forth what we believe to be the basic national policy which controls other provisions of this particular title. It is a very simple measure. It is designed to insure that Federal funds shall not be used to subsidize discrimination. It writes into law a basic concept that the Government should not support programs which discriminate on the grounds of race, color or national origin.

It was intended to help remedy the continuing effects of ethnic and racial discrimination, and I believe that title VI can be viewed as a statutory extension of the 14th amendment, the equal protection clause, of the Constitution to the acts of recipients of Federal assistance.

To convert this clear law into another purpose, we believe, would be contrary to the intent of the statute. The rights of the unborn, the efficacy of *Roe* v. *Wade*, the interest of mothers, putative fathers and the State are all subjects which may require the attention of the Congress. However, we believe that it should not be as an amendment to a historic statute with another purpose, another subject.

Title VI's purpose is to insure that Federal assistance will not be used to subsidize illegal discrimination on the basis of race, color, or national origin. And the unique history of our country, reflected in our Constitution, is the benchmark for interpretation of title VI. The Civil War amendments expressly, as a matter of national policy and law, ended unlawful racial segregation. Years of court cases, civil disobedience and national unrest led to the passage of title VI of the 1964 Civil Rights Act, which was the first major Civil Rights Act in 82 years.

Presidents Kennedy, Johnson, Nixon, and Carter in either executive orders or memoranda, were clear on what title VI was desiqned to do.

I indicated earlier that the NAACP has no position on the issue of abortion, but we are vehement in our opposition to amending the clear purpose of title VI of the 1964 Civil Rights Act.

Let me refer you to a statement made by Senator Pastore on the floor of the Senate when he went beyond what President Kennedy said identified as simple justice as a justification for title VI. In his closing floor statement. Senator Pastore said: "Let me say it again. The title has a simple purpose, to eliminate discrimination in federally financed programs."

The NAACP urges you, Mr. Chairman and members of the committee, to vote against S. 522 or any other measure designed to neutralize, limit or dilute the clear purpose of the major Federal statute available to complete the constitutional mandate ending unlawful segregation and guaranteeing to all with regard to race, color, or national origin.

We certainly appreciate this opportunity to present our views. We would be pleased to answer any questions not on abortion.

[The statement of Ms. Simmons follows:]

PREPARED STATEMENT OF ALTHEA T. L. SIMMONS

Mr. Chairman, thank you for this opportunity to testify on behalf of the National Association for the Advancement of Colored People, a nationwide organization with 2,100 chapters, youth councils and college chapters. We oppose S.522, to amend the Civil Rights Act of 1964 to protect the right of the unborn.

Mr. Chairman, and members of the Committee, the NAACP has no position on abortion and the myriad issues inherent therein. The NAACP, as you can well imagine, however takes strong issue with re-directing the meaning and purpose of Title VI of the Civil Rights Act of 1964 away from a national affirmation of the policy and Constitutional mandate opposing racial and national origin segregation.

The Congress correctly has used its awesome spending power to redress societal wrongs and we support this use of legislative power. Title VI however involves more than *one* Constitutional mandate. It specifically and expressly was passed to ensure that federal assistance would not be used to support even the vestiges of our past as a slave-owning nation. Section 601 says:

> No person in the United States shall, *on the ground of* race, *color or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (emphasis added)

To convert this clear law into another purpose would be contrary to the intent of this statute. The rights of the unborn, the efficacy of *Roe* v. *Wade*, the interest of mothers, putative fathers and the state, are all subjects which may well require the attention of Congress.

Our national Congress may decide to address these issues but it should not as an amendment to an historic statute with another purpose, another subject.

Title VI covers areas such as transportation, housing, education. Its purpose is to ensure that no federal financial assistance shall be used to subsidize illegal discrimination on the basis of race, color or national origin. The unique history of our country, reflected in our Constitution, is the benchmark for interpretation of Title VI. The Civil War amendments expressly and, as a matter of national policy and law, ended unlawful racial segregation. Years of court cases, civil disobedience and national unrest led to the passage of Title VI of the Civil Rights Act of 1964 - the first major Civil Rights Act in 82 years.

I indicated earlier NAACP has no position on the issue of abortion. The NAACP is vehement in its opposition to amending the clear purpose of Title VI of the Divil Rights Act of 1964. The NAACP urges the members of this Subcommittee, the full Judiciary Committee and the Senate, to vote against S.522 or any other measure designed to neutralize, limit or dilute the clear purpose of the major federal statute available to complete the Constitutional mandate ending unlawful racial segregation and guaranteeing equality to all without regard to race, color or national origin.

Thank you for this opportunity to present our views.

Senator HATCH. We are happy to have your views, Ms. Simmons.

Professor Rosenblum, how has the language "to perform abortions" in the Hyde amendment been interpreted? Has it been expanded to cover abortion counselling or referrals, or has it been narrowly construed to apply to the operation terminating fetal life?

Mr. ROSENBLUM. I think all the indications, Senator Hatch, are that it has been strictly construed and that the language is crystal clear and that the enforcement of it is crystal clear, that it is narrowly applied and applied only for the performance of abortions.

Senator HATCH. How would you expect it to be construed in connection with S. 522?

Mr. ROSENBLUM. I think the language of S. 522 is as clear as it could possibly be. It talks of the performance of abortion, that no such assistance shall be used to perform abortions, and I do not believe that there is any overlap or any linkage that goes into other areas.

I do, like Professor Destro, wish that there could be a stronger antiabortion revision at this juncture. This is an incremental but vital implementation of the Hyde amendment and nothing more than that, and I believe that its language is not capable of being misconstrued.

Mr. DORSEN. May I comment on that?

Senator HATCH. Surely.

Mr. DORSEN. Professor Rosenblum refers only to the second part of section 606, but the first part says nothing contained in the Civil Rights Act of 1964 shall be construed to authorize the use of Federal financial assistance for abortions. It is not limited to the performance of abortions. It could be limited. I do not know whether courts would do so or not. I assume courts would differ. But it is not limited as is the second section, solely to the performance of abortions.

Senator HATCH. Professor Destro.

Mr. DESTRO. I have to disagree with that because, first of all, the first part is really severable from the second part. The first part says "nothing in the Civil Rights Act of 1964." I would have to conclude that this language underlines the language of title VII which otherwise might require employers to pay for abortions. It is not going to authorize the use of any Federal money or require Federal employers to pay for abortions.

But as Professor Rosenblum says, the term "perform abortions" has always been held to mean physical act of performing abortions. I would point you to page 15 of my testimony where a California State court has ruled that the term "performance of abortions" in section 300a-7 of title 42, which is the conscience provision, has been ruled to mean the physical performance of abortion; that is, the act of performing an abortion. It does not include indirect subsidy or insurance subsidy. So I think there has been a consistent interpretation of the term across the board.

Mr. DORSEN. If I may add one word. I would agree with Professor Destro that the interpretation he has stated is a possible one. I do not happen to be familiar with the California case he referred to, but it does not surprise me that a case would hold that way.

The question is whether or not this is ambiguous and capable of being interpreted differently, and I would submit with all respect that his response to my comments do not settle that issue.

The first clause is broader than title VI. It relates to the entire Civil Rights Act of 1964, not just title VII. It also is not limited to the performance of abortion. We all know that courts are capable of many strange interpretations of statutory language in view of their concern for particular values that may be stated or unstated. And although I want to repeat that Professor Destro's interpretation is a permissible one, it certainly is not the only possible one.

Senator HATCH. Professor Destro, how would you respond to the argument that this permanent abortion funding restriction could limit a woman's right to abortion as established by *Roe* v. *Wade?* Would it constitute a denial of equal protection or due process?

One last question: Does not the spending power of the Congress give Congress the right or the power to make such limits on Federal funding?

Mr. DESTRO. I do not see how, if the Supreme Court was correct—and I believe they were in *Harris* v. *McRae*—one can argue that merely because a constitutional right to undergo a certain surgical procedure that you have the right to have the Federal Government or any other governmental agency or any other person to help you pay for it. I do not see that this law goes any further than that principle.

This law does not impose limits on abortion or grant rights to the unborn. I would like to see that done, but this law does not do it. With respect to your second question, I have to plead that I forgot what it was.

Senator HATCH. Well, does not the spending power——

Mr. DESTRO. That is right. I addressed that in my testimony. I believe the Congress has the right to condition spending as long as it does not condition the spending on giving up an otherwise available constitutional right. I think the Supreme Court ruled in *Harris* v. *McRae* that restriction on abortion funding is not one of those conditional cases. It is just that the Congress will not participate in the exercise of the constitutional right.

Mr. DORSEN. May I comment on that?

Senator HATCH. Surely.

Mr. DORSEN. First of all, I am pleased that Professor Destro's statement just now, slightly modified from what I understood his earlier statement to be when he talked about the funding of abortion. In his extemporaneous remarks he suggested that abortion was being funded because it was a constitutional right and then suggested we all have first amendment rights, but that does not mean that the Government must support us in setting up a newspaper or renting a hall.

The reason abortion is funded in Medicaid is not because it is a constitutional right but because it is a medical procedure, just like other medical procedures. What the Government did, of course, was decide that this medical procedure would not be funded.

There is a deep irony and even a paradox here. The one medical procedure that the Government decided it would not fund is the only one that was recognized as a constitutional right in *Roe* v. *Wade*. All the other medical procedures may be advisable or not advisable, but here is the only one that the Supreme Court said—by 7 to 2—was a constitutional right. Yet this is the only medical procedure eliminated from funding.

One final point. Professor Destro suggests that the Supreme Court has a limited role and that Congress has the dominant role in the protection of human rights. I think that would come as a complete surprise to a lot of people, including Chief Justice Burger who wrote the opinion for the unanimous Supreme Court in *United States* v. *Nixon*, saying that it is distinctly the role of the Supreme Court to say what the law is, including constitutional law. That sentence was derived from Chief Justice Marshall's opinion in *Marbury* v. *Madison;* it goes back to the beginning of the Republic.

I happen to believe that Congress can play a very positive role in protecting human rights, but it should be at the cost of the special province of the Supreme Court.

Mr. ROSENBLUM. There are a few people in this world for which I have as high a regard as my distinguished colleague, Professor Dorsen, but we do disagree on this issue. I think it is important to point out that there is not now and there has never been a constitutional right to abortion.

What the Supreme Court declared is that there is a constitutional right to privacy that under certain circumstances includes the choice to have an abortion on the part of a woman in conjunction with her physician.

The point has been stressed over and over again that it is the right to privacy and indeed it was because it was the right to privacy that it was possible and necessary for the Court to reach the decision that it reached in the *McRae* case and in the *Williams* v. *Zbaraz* case. Had there been a constitutional right to abortion, there is no question that the Hyde amendment would have had to be declared unconstitutional.

Senator HATCH. Thank you. I have to leave. Senator Denton is here. He would like to make a concluding statement for the record. I have a number of extensive questions for all of you. I would like to submit those in writing. I think perhaps because of the heat with regard to this issue, it might be well to have these questions submitted in writing and have your responses thereto for the record so that we can build a good record on this matter.

Senator HATCH. I am very happy to have Senator Denton with us at this hearing. Senator, if you could, I am going to have to leave. Would you close out the hearing then, make your statement and———

Senator DENTON. Mr. Chairman, I came by to explain that I must attend a full Armed Services Committee meeting this morning and then another full Judiciary Committee meeting. However, I want to express my interest in this hearing and show my support for you in your effort to put abortion back into the proper context, which is outlawed.

I will be very anxious to review the testimony from this hearing. I am sorry my schedule precluded my attendance during the entire hearing. Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator. We appreciate having you here. I want to thank all four of you for being here. This has been an enlightening hearing to me. This is a very difficult issue. I think there are some very sincere and dedicated people on both sides of it; there are arguments on both sides. I have listened to most, if not all, of them during my tenure as chairman of the Constitution Subcommittee, and I just want to personally thank the four of you for being with us today.

I will submit these questions. I will keep the record open until the end of the day for any questions that any member of this full committee would care to submit to you four witnesses. Again, I just want to thank you for your kindness in being here. It is good testimony that we have received today.

With that, we will recess until further notice.

[Whereupon, at 10:56 a.m., the hearing was recessed, to reconvene subject to call.]

ABORTION FUNDING RESTRICTION ACT

MONDAY, JULY 22, 1985

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 226 Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Thurmond.

Staff present: Stephen J. Markman, chief counsel and Randall Rader, general counsel.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The subcommittee will come to order.

On January 22, 1985, the 12th anniversary of the *Roe* v. *Wade* decision, President Reagan stated:

> Surely recent advances in medical technology have changed the debate. Surgeons now speak of the "patient in the womb." We now know more than ever before about the unborn. . . . There are already signs that . . . public attitude on abortion have changed. The number performed each year is finally leveling off. The general feeling that abortion is just a small, harmless medical procedure that is simply a matter of choice has almost disappeared. I will continue to work with all of those in the Congress who believe, as I do, that abortion is taking the life of a living human being and that the right to abortion is not secured by the Constitution.

The President's remarks serve well to characterize the current posture of the ongoing debate concerning the constitutionality of the right to abortion. The bill before the committee today, the Abortion Funding Restriction Act, S. 522, does not address this important issue, but simply codifies a policy adopted by the Congress every year since 1976. Congress has endorsed since 1976 the proposition that regardless of the constitutional merits of a right to abortion, taxpayer funds should not be used to finance a practice considered to be the taking of human life by a vast number of those who support the U.S. Treasury.

S. 522—like the Hyde amendment, it would permanently codify—does not restrict abortion in general, but only denies Federal funds to perform abortions. Accordingly S. 522 reaffirms a longstanding national policy that prefers childbirth over abortion by declining to finance abortion except when the life of the mother would be endangered if the fetus were carried to term.

In *Harris* v. *McRae*, the Supreme Court carefully delineated this distinction between regulating abortion per se and regulating the Federal funding of abortion:

> The Hyde amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather . . . encourages an alternative activity considered in the public interest . . . It simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.

Most States have adopted a similar policy. Today, three-fourths of the States deny Medicaid funding for most abortions, a practice upheld by the Supreme Court in *Williams* v. *Zbaraz*.

Title VI of the Civil Rights Act of 1964 is a very appropriate vehicle to make the Hyde amendment permanent. A restriction on Federal financial assistance in title VI has the virtue of reaching each potential source of funding for the performance of abortions. Indeed, the objective of the authors of title VI was to avoid the obstacle of attempting to amend each and every law that had to be changed to effect the desirable public policy of nondiscrimination. Similarly the legal objective of S. 522 is to extend to all potential Federal funds a qualification enforcing another desirable public policy; namely, the preference of childbirth over abortion.

As I mentioned at the last hearing, seven current Federal programs could potentially finance the performance of abortions. Five of these programs are currently covered by the Hyde amendment, the other two—military hospitals and the CHAMPUS Program—are within the appropriations for the Department of Defense, which also enforce a Hyde amendment policy by regulation. S. 522, therefore, would not effect any change in current abortion funding policy, but it would make that policy permanent in an effective and potent manner without numerous amendments to authorizing legislation. Title VI was originally enacted for that purpose and should again serve masterfully as its authors intended.

S. 522 is narrowly crafted to reach that objective and nothing more. The language of the bill specifically places limits only on Federal financial assistance, not on recipients or programs. Thus, only the specific Federal financial assistance could not be used to perform abortions; recipients and programs could continue to use private funds without restriction. The restrictions of S. 522 would not extend beyond a limit upon the use of the actual Federal assistance to perform abortions. In this sense, S. 522 would operate exactly as the Hyde amendment itself.

By the way, the concept of restricting Federal financial assistance without restricting private activities of a recipient or a program receiving Federal aid has a constitutional basis. Several courts of appeals have held that Federal financial assistance may not be denied to a recipient because it engages in a constitutionally protected activity, but the financial assistance itself may be so restricted. See, for example, *Planned Parenthood* v. *Kempiners*, (7th Cir. 1981); *Valley Family Planning* v. *North Dakota*, (8th Cir. 1981); *Planned Parenthood* v. *Arizona*, (9th Cir. 1983). Thus the courts have acknowledged the distinction between limiting Federal financial assistance and limiting recipients or programs receiving such assistance.

In conclusion, I would like to recall what one witness stated in the first hearing on this bill. He said, "Like the Civil Rights Act itself, S. 522 is an imperfect solution" to an important problem. Recognizing that the hearing process is an ideal time to improve imperfect bills, I would invite my colleagues and any other interested party to design a bill that better accomplishes the objective of codifying permanently the national policy embodied in the Hyde amendment.

Speaking as one who has tried, I can say that you will not find this to be an easy task because, as I mentioned earlier, many different forms of Federal financial assistance could be used to fund abortions. Drafting a bill applicable to all potential sources of Federal funding calls for a vehicle similar to title VI. Nonetheless I am open to better proposals and in that spirit welcome our witnesses to this hearing

Our first witness will be our colleague, Senator Robert Packwood. Perhaps no one anywhere, certainly no one in the Senate is a more articulate and dedicated advocate on issues related to abortion than my friend from Oregon. In fact, it is due to your leadership in this area that we postponed our earlier hearing to accommodate the enormous efforts you had been putting into rewriting the Tax Code. I might add for the benefit of all of our witnesses today that the subcommittee would encourage you not to read the written statements, which will be made part of the record. We will keep the record open for the subcommittee to question by written interrogatories as well.

Bob, we will take your testimony.

STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator PACKWOOD. Mr. Chairman, would you mind if Congressman Leland joins me? I would appreciate it very much. Our testimony is a package. I am emphasizing one aspect; he is emphasizing another.

Senator HATCH. OK.

I would just say Congressman Mickey Leland is from the 18th District of Texas, and you appear today, Congressman Leland, as a representative of Black Caucus, so we certainly want to welcome you to the subcommittee as well.

Senator PACKWOOD. Mr. Chairman, I want to thank you for allowing me to testify on a bill of great concern to me, S. 522, and to doubly thank you for arranging the hearing so that I could testify.

The Chair is aware that I chair hearings 4 days a week on the tax reform bill, and will through this month and through September, and Mondays are the only days I have. You are very gracious to accommodate me this morning.

I am here today to more raise questions than I am to provide answers. I do not think S. 522 is a simple permanent Hyde amendment as you have indicated in your opening statement today, Mr. Chairman. I believe it can be interpreted as much broader than that.

From the perspective of a supporter of a woman's right to choose, my testimony focuses on why I feel this bill represents a serious threat to a woman's constitutionally protected freedom to make her own reproductive decisions.

There are two central abortion questions that we frequently debate in the Senate. One, should a woman's right to choose to have an abortion be legal; two, should a woman's right to choose to have an abortion be financed by the Federal Government if she cannot afford an abortion on her own.

Since 1973, a woman's right to a legal abortion has been secured by the Constitution. There have been many unsuccessful judicial and legislative challenges to that Supreme Court ruling, *Roe* v. *Wade*. That decision has been reaffirmed in numerous court decisions and the Senate has rejected legislative attempts to overturn it.

On the question of a woman's legal right to secure an abortion, the law of our land is perfectly clear. In terms of public financing of abortion, however, the law is not so clear. Many times I have gone to the Senate floor to fight the so-called Hyde amendments that restrict the use of Federal money for abortions on appropriation measures. Most often these amendments prevail and for several years our public policy has been not to finance this one medical procedure that has been constitutionally secured. My good friend Norman Dorson pointed out the irony in this fact when he presented testimony to the Judiciary Committee on this same bill.

As you know, Mr. Chairman, the Supreme Court has held in *Harris* v. *McRae* that it is Congress' public policy right to decide whether or not to ban Federal funding of abortion. So, the question of public funding of abortion is a public policy matter for this body to decide.

But on the question of legality of abortion, the law is clear and if this body is to change that law, we are changing constitutional law.

Now, as to whether this bill, S. 522, deals with just the Federal financing of abortion question or whether it also infringes on a woman's right to choose, I have studied what you have said, about the bill. After all, the legislative history of the bill, including statements by the sponsors, especially its principal sponsor, is used to interpret the meaning of the law after its enactment.

I am confused. Let me read from your own statement at introduction: "S. 522 is a bill to amend the Civil Rights Act of 1964 to protect the rights of the unborn. In other words, Mr. President, this bill would replace the annual time-consuming appropriation battle over the Hyde amendment with a permanent statute."

This is why I find it confusing. A simple permanent Hyde amendment is one thing. Granting civil rights protection to the fetus is quite another.

I can think of all sorts of arguments lawyers could make based upon the statement of the sponsor. The bill seems sufficiently ambiguous to allow many different conclusions as to what it can mean.

Based upon my understanding of existing abortion law and what you yourself said about the bill, I would like to raise a few serious arguments that litigants could make about the meaning of this legislation.

You say in introducing the bill that it would "bar the use of Federal financial assistance for abortion within the reach of title VI of the Civil Rights Act. Federal agencies would add to their current regulations enforcing the Civil Rights Act appropriate restrictions on abortion."

Expanding the reach of title VI to prohibit abortion would probably prohibit the performance of abortion, regardless of whether the woman pays for the procedure herself, in any public or private facility that receives any Federal funds. This could result in a ban on abortion in any hospital or institution that receives any Medicaid, Medicare, or even Hill-Burton funds.

I make this argument because, unlike the Hyde amendment, title VI has never been just a ban on the use of Federal funds for certain prohibitive or proscribed activities. Rather, it has been a ban on prohibited activities as a condition for receipt of Federal money. A program or activity eligible for Federal financial assistance must sign an assurance of compliance form stating that they are not discriminating at all—with private or public money—as a condition for receiving Federal money.

Arguably if S. 522 were enacted, and a hospital were providing privately funded abortion services, that hospital would be deemed ineligible for Federal funding until it corrects discrimination against the fetus, and thus stops performing abortions.

If this bill would ban abortions at all institutions that receive Federal funds, then let us be honest about the result: No abortion would be performed in virtually any hospital in America. Indeed, women might have a difficult time finding a health care facility to provide abortion services if S. 522 were enacted.

In *Roe* v. *Wade*, the court held that the fetus is not a legal person within the meaning of the 14th amendment. When Congress enacted civil rights laws, it carried out the protection of persons within the meaning of the 14th amendment. S. 522 is an attempt to extend civil rights laws to cover entities that are not persons within the meaning of the 14th amendment.

S. 522 amends the Civil Rights Act of 1964, a major enactment to protect the constitutional rights of "persons." As I stated earlier, Mr. Chairman, you say the bill is designed to "amend the Civil Rights Act of 1964 to protect the rights of the unborn." Therefore I could conclude that S. 522 is a clear attempt to establish fetuses as having full constitutional protection and rights from the moment of conception.

Conferring of personhood on a fetus infringes on a woman's legal right to choose. How do we balance the civil rights of the fetus against the civil rights of the woman? Could a woman no longer have a right to an abortion because abortion is a violation of the fetus' civil rights?

The Supreme Court held in *Harris* v. *McRae* that the Hyde amendment alone placed no Government obstacle in the path of a woman who chooses to terminate her pregnancy. The *McRae* decision further held that the Government cannot put obstacles in the path of a woman exercising her freedom of choice.

For the reasons that I have just outlined, Mr. Chairman, I believe that S. 522 can be interpreted to be much more than a simple permanent Hyde amendment and it would place substantial obstacles on a woman's ability to choose to have an abortion.

Witnesses before this committee have suggested that S. 522 is in conflict with both the *McRae* decision and the fundamental constitutional guarantees of *Roe* v. *Wade*. Let me just say that when Congress starts trying to overturn a constitutionally guaranteed right by a simple statute, I get very, very concerned.

The sponsor of this bill says by introducing S. 522 that his intent is to "codify permanently the Hyde amendment" restricting use of Federal funds for abortion. Let me suggest that if that is the principal and sole purpose of this legislation, why not propose that the language of S. 522 be added to legislation authorizing the expenditure of Federal funds, in much the same manner as the Hyde amendment is appended to legislation appropriating funds for health care services.

I would oppose that measure as well, as I oppose this one, but at least that would be a true permanent Hyde amendment. Instead, what this bill does is amend the 1964 Civil Rights law and as Victor Rosenblum said at an earlier hearing on this bill:

> The most compelling reason for this bill is to recognize the abortion issue for what it is, an issue of civil rights for unborn Americans. Enactment of S. 522 will for the first time bring the protection of the unborn within the rightful purview of the Federal rights laws.

Mr. Chairman, this statement is evidence of the most objectionable aspect of the legislation we have before us. It is an improper legislative attempt to overturn the Supreme Court ruling protecting a constitutionally protected right to choose and it is done with a simple statute.

Mr. Chairman, in the past few years we have been faced with a variety of statutory efforts to overturn *Roe* v. *Wade*. In some cases it was the so-called human life statute; in others it was court stripping bills. I am sure we are going to be faced with a plethora of efforts in the future.

Almost all of them are nothing more than a naked attempt to reverse almost 200 years of constitutional history in this country. They are an effort to give Congress, rather than the Supreme Court, the right to determine what is constitutional.

In 1803, Chief Justice Marshall in the famous case of *Marbury* v. *Madison* said that the Supreme Court has the right to determine whether or not acts of the Congress were constitutional. In addition, from that time onward, it has been held that the Supreme Court has the ultimate and final right to determine what is and is not constitutional.

It may be the desire of some Members of this Senate—although I pray it is not the desire of the chairman—to reverse almost two centuries of constitutional history. In the last 30 years we have seen a spate of bills introduced to overturn constitutional decisions of the Supreme Court. In the 1950's those bills related to court findings on the constitutional right to remain silent. In the 1960's they related to legislative abortion. In the 1970's it was school prayer. In the 1980's it is abortion.

There are always those who will be dissatisfied with Supreme Court decisions. Indeed, there are many decisions of the Supreme Court with which I disagree. But as the chairman well knows, if we are dissatisfied with those constitutional decisions, we should attempt to overturn them by initiating and passing a constitutional amendment.

To his credit, the chairman of this committee endeavored to do that in the last Congress with a constitutional amendment to overturn *Roe* v. *Wade*. That is the proper way to go. I opposed that amendment then and I would oppose it now. But I laud the chairman for using the proper constitutional procedures.

If we are now going to stand on its head 200 years of constitutional history and shift from the Supreme Court to the Congress the right to determine the constitutionality of acts of Congress, let us debate that subject on its merits or demerits.

I find it totally without merits and dangerous to the civil liberties of this country.

If we are going to debate it, let us focus on the issue as it should be focused on, the proper division of constitutional powers of this country and interpretation of the Constitution.

We should not mix a constitutional debate of that magnitude with the issues of school prayer, or abortion, or school busing, or any other subject which stirs such fleeting passionate emotions.

The individual liberties of all Americans are too precious to be sublimated in a debate to transitory issues.

If who should interpret the Constitution is to be the subject of debate, let us start that debate. Let us have lengthy hearings and learned discourses. Let us weigh the pros and cons of such a shift, but let us not do it on S. 522.

Senator HATCH. Thank you, Senator.

We will turn to you, Congressman Leland, at this time.

STATEMENT OF HON. MICKEY LELAND, A MEMBER OF THE HOUSE OF REPRESENTATIVES FROM THE STATE OF TEXAS

Mr. LELAND. Thank you very much, Senator Hatch and Senator Thurmond.

I want to thank Senator Packwood for his leadership in this matter, and I appreciate the eloquence with which he has expressed the concerns of many millions of American people.

Let me, however, turn from his testimony to another area of interest that we have. I have come here before you, Mr. Chairman, as representative of the 20 members of the Congressional Black Caucus, and I speak for all of us at this moment.

We are most vitally concerned that the legislation you have put forth would do grave damage to the Civil Rights Act of 1964. I come here not only as chairman of the Congressional Black Caucus, as a black Member of the U.S. Congress and black citizen of this country, but I also come here as a Catholic.

Let me, if I can, go back in history just a bit and give you some testimony about why I have arrived at where I am today.

I grew up in the South, like a good old boy from Texas. Perhaps could be in someone's novel some day, but let me say that this is a true story about me.

I grew up in the fifth ward of Houston, TX. My mother reared two boys by herself. She worked at a drugstore making hamburgers and milkshakes as a short order cook in the fountain at that drugstore.

My brother and I were small boys. we were 5 and 6 years old when my mother decided to go to college. She began college and struggled there for 4 years at Texas Southern University. She reared two boys during the time she was in college, making about $30 or $40 a week.

We did not know anything about discrimination or racism. All we knew was that we were locked into a very difficult economic situation.

Having graduated from high school, I went to work my first year out at the American Can Co. I worked in the shipping department where I was confronted with the worst kind of racism there ever could be, and I determined then that it was my duty, because of the example my mother had set, for me to help not only myself, my brother, and my family but my community bound from the scourge of the economic depression that we had, probably because we were black. And so as a result, I decided to choose the political arena—not as an elected official, but rather to involve myself in the civil rights movement during the time I was a student on campus at Texas Southern University, in the school of pharmacy. It was rather difficlut for me because I was in a strict scientific discipline in pharmacy, but I decided that I was going to spend at least half of my time working to try to liberate my people from the mire and the scourage of racism, depression, oppression, and all of the adversities that were perpetrated on us as a people.

During the time I was in college, I found there were more people who were suffering, not only blacks but also Hispanics, native Americans, Asians, and other ethnic minorities in this country.

I became very deeply convinced that indeed I had to do all I could in my lifetime to help change the circumstances of life for all of them.

Having graduated from college, Mr. Chairman, I then went on to the Texas State Legislature. Before this I also worked for a year in the School of Pharmacy at Texas Southern; taught and worked with young people to try and give them an opportunity to have the special experiences that I had myself in the civil rights movement as well as the scientific discipline of pharmacy.

Having taught in Texas Southern for a year, I decided this was not my arena; I could do a whole lot more if I had chosen to become an elected official, so I ran for the State legislature.

Blacks were facilitated that opportunity by single member districts. I was elected in 1972, took office in 1973. From that time on I have been an elected official serving hopefully the interests of not only my constituents, but also our country.

I have fought in the civil rights movement, Mr. Chairman, and by the way, I am not so young that I do not remember having to ride on the back of the bus. I am not so young that I do not remember seeing different kinds of signs for black people, or colored people at the time. I remember all of those things. And as a youngster, as I have explained to this committee, I tried to do things to remedy the circumstances, the adverse circumstances of black people.

I remember in 1964 the Civil Rights Act was passed: the most historic act of this Congress as far as the black people are concerned. It is a very, very sacred act.

I have somewhat given you the evolution of Mickey Leland, because I wanted you to understand the Civil Rights Act of 1964 is very, very sacrosanct to Members of Congress like myself. I would hold that probably all of the 20 members of the Congressional Black Caucus came to this Congress to make sure that we would advance the cause of ethnic minorities in this country.

We felt very strongly that, in our lifetimes, we wanted to see racism and discrimination obliterated, and I will tell you that at this sitting, in 1985, we have not realized that.

We feel very strongly, Senator Hatch, that if in fact S. 522 is passed, this will do incredible harm to what we have worked for in the advances for civil rights in our country. We feel that it is going to raise graver issues. It is going to interject the controversy of the antiabortion movement into the civil rights movement. We are going to put blacks and ethnic minorities, who have gained so much from the civil rights movement, in the middle of the struggle between the antichoice and the prochoice groups.

We do not want to be involved in that struggle. We have chosen, even as we put forth the Civil Rights Restoration Act subsequent to the *Grove City* case before this Congress, to be abortion neutral. We have conferred with the representatives of the Catholic bishops in this country. We have talked to them very seriously and very frankly about our position on *Grove City* as well as the antidiscrimination bill that has come before the Congress.

What we have pointed out is just this, and again, Mr. Chairman, I sit as a Catholic, and I do not believe personally in abortion. I believe in prochoice. I believe it is between the woman who makes the decision to have an abortion or not to have an abortion—it is between she and her Maker—our Maker, I should say more appropriately. I feel very strongly about that, as Senator Packwood has stated today. I concur with him on his position.

But at the same time you must understand that in 1964 it was very difficult to pass the Civil Rights Act. It took the death of President Kennedy and efforts of many, many black Americans as well as many other Americans who had good will in their hearts, to see that discrimination or racism would be gone in this country.

People died during the civil rights war to ensure that the blacks in this country would have a right to be equal citizens.

We resurrected that struggle this year because, again, you must recognize that black people as well as other ethnic minorities exist on the bottom rung of the economic, social, and political ladder in this country.

In your bill you talk about the rights of the unborn, and I understand your concern very well—but let me say to you that what you are doing is incredible harm to the Civil Rights Act, because you are going to help to raise opponents to the Civil Rights Act.

I know you on a personal level and I know that you do not have any intent whatsoever to destroy the Civil Rights Act of 1964. I know that you want to advance the cause of ethnic minorities in this country. I would hope that you would understand our concerns about what you are doing here.

Please, whatever you do, do not thrust black ethnic minorities and others in the middle of a struggle between antichoice and prochoice groups.

We have worked too hard too long. It has been over three centuries that black people have been on this continent. We suffered slavery; we suffered second-class citizenship; we suffered the inability to vote in this country; we suffered all kinds of atrocities, just as a people.

What we are trying to do, what we are trying to say to the Congress is that we only want to advance, we only want to be contributing members of our society, full participating members of our society.

With that, Mr. Chairman, I would just add that I understand your strong feelings and convictions, but do not let the Civil Rights Act serve as a forum to deal with an issue that is unrelated in our estimation.

Thank you, Mr. Chairman.

Senator **Hatch**. I thank both of you for making statements here this morning.

I might add, S. 522 is not an amendment to section 601 of title VI, which prohibits racial discrimination in Federal programs and activities. It is an entirely new section, section 606, which does not apply to programs or activities at all.

This only limits the use of Federal funds that could potentially be used for abortions.

It sets up its own restrictions unrelated to the language of section 601 and limits the use of this particular section with regard to Federal financial assistance only.

No language in this bill affects *Roe* v. *Wade* in the slightest, or confers any rights upon unborn children, at least that is not my intent.

By the way, this bill does not affect in any way the program or activities involved in *Grove City*, or in the *Grove City* legislation. It does set up an entirely new section in the Civil Rights Act which only enacts the Hyde amendment, and that is the intent of it.

But I appreciate the concerns that both of you have raised and will continue to examine this, and I know that the concerns of both of you are very sincere concerns from your perspective, and I will certainly give every consideration to what you have said. I want to thank you.

Senator **Packwood**. Thank you, Mr. Chairman.

Mr. **Leland**. Thank you.

Senator **Hatch**. Our next witness will be Ms. Kay James, public relations director of the National Right to Life.

As I understand, Ms. James, you have just recently accepted this position with the National Right to Life Committee and we congratulate you on your appointment, and look forward to your testimony and will take it at this time.

STATEMENT OF KAY JAMES, PUBLIC RELATIONS DIRECTOR, NATIONAL RIGHT TO LIFE

Ms. **James**. Mr. Chairman, distinguished members of the subcommittee, I am Kay James, director of public affairs for the National Right to Life Committee.

I thank you, Mr. Chairman, for this opportunity to testify on behalf of the National Right to Life Committee in support of S. 522, the Abortion Funding Restriction Act.

The National Right to Life Committee, formed in 1973, is the Nation's major prolife organization. I speak for our 50 State affiliates and over 2,000 local Right to Life chapters.

Since its inception, the mission of the National Right to Life Committee has been to defend innocent human beings whose right to life is threatened or denied by legal abortion, infanticide, or euthanasia.

The National Right to Life Committee looks forward to the day when full legal protection will be restored to unborn children in America. The Supreme Court's grievous 1973 *Roe* v. *Wade* ruling must be overturned. I know that is a goal which you share, Mr. Chairman.

But the proposal before the subcommittee today, S. 522, has a far more limited goal. The sole purpose of S. 522 is to effectively and permanently prohibit Federal funding of abortion, except to save the life of the mother.

Since 1976, the Congress has restricted funding of elective abortions under Medicaid through the Hyde amendment, a rider to the annual Labor/HHS appropriations bill. Your bill, Mr. Chairman, would make that policy permanent law.

S. 522 is an amendment to the Civil Rights Act of 1964. It is appropriate that such a permanent prohibition on Federal funding of abortion be placed within title VI of the Civil Rights Act. Unborn children are living members of the human family, but they are currently regarded as little more than chattel—property—under the decrees of the Supreme Court.

It is of substantive importance that the Hyde amendment be made permanent, thus placing the current policy against funding abortions beyond the vagaries of the annual appropriations process and the ever-changing procedural rules governing appropriations bills.

Symbolically it is quite appropriate to place such a restriction within title VI of the Civil Rights Act.

Mr. Chairman, as our name indicates, the National Right to Life Committee has always regarded itself as a civil rights organization and we regard the issue of abortion as a civil rights issue in the most profound sense. By enacting a permanent policy that the Federal Government will not subsidize the destruction of unborn human beings, and placing that policy within the Civil Rights Act, the Congress would be making an implicit statement that abortion is not simply another "medical procedure," but rather is a life-destroying procedure which the Congress will not subsidize. This bill establishes a Federal public policy preference for childbirth over abortion.

However, S. 522 represents only a small step toward restoring affirmative legal protection to unborn children.

I will leave detailed discussion of the legal aspects of S. 522 to Mr. Bopp. I would only observe that some proabortion advocacy groups have presented this subcommittee with extravagant misinterpretations of S. 522. Even though S. 522 consists of one sentence which addresses only the use of Federal funds to perform abortions, these groups have insisted that in some mysterious fashion the bill would confer legal personhood on unborn children.

The National Right to Life Committee supports constitutional amendments and other legislation which would establish legal personhood for unborn children, but S. 522 is not intended to do anything other than curb Federal funding of abortion. The bill prohibits only the direct use of Federal financial assistance for abortion; it does not prohibit recipients from funding abortions from other sources. The bill confers no substantive rights for unborn children.

The proabortion organizations which engage in these farfetched extrapolations on the simple text of S. 522 understand very well that a majority in each House of Congress opposes Federal funding of abortion, except to save the life of the mother. Therefore they would rather not debate a permanent Hyde amendment bill, such as S. 522, on its merits. Instead, they wish to shift the focus to the personhood issue and to invoke fantasies regarding the registration of pregnancies and miscarriages with Federal pregnancy police.

Some of these groups, such as the Leadership Conference on Civil Rights, insist that they have no position on abortion. But somehow they seem to find reasons to oppose most major pieces of antiabortion legislation which begin to move through the Congress.

I have a copy of a letter to the chairman of the full Judiciary Committee dated April 2 in which 20 advocacy organizations opposed S. 522 on the grounds that it "could open the door for the Civil Rights Act to become little more than a vehicle for every controversial cause."

Mr. Chairman, although I hate to admit it, I am old enough to recall that the Civil Rights Act of 1964 itself was quite controversial in its time. Since its initial enactment, it has been amended many times, and many of the amendments have been somewhat controversial—including the Pregnancy Discrimination Act of 1978. That act amended title VII of the Civil Rights Act to require employers to provide pregnancy-related benefits. This provision contains an explicit exception for abortion.

Mr. Chairman, on July 15, Senator Kerry and other Senators introduced S. 1432, the so-called Civil Rights Amendments Act. That legislation would amend numerous provisions of the Civil Rights Act of 1964—including title VI—to prohibit "discrimination on the basis of affectional or sexual orientation." The Kerry bill involves an issue completely outside of the purview of the National Right to Life Committee—but we will watch with great interest to see if the NAACP, the Leadership Conference on Civil Rights, and the other groups which have objected to your bill on the basis that it interjects a controversial subject unrelated to race into title VI, will oppose Senator Kerry's bill with equal vigor on the same basis.

If not, then perhaps the sincerity of their nonposition on abortion should be questioned.

Mr. Chairman, having disposed of a few red herrings, allow me to now briefly address the underlying public policy issue: Should the Federal Government be in the business of funding abortion?

In our view it would be an atrocious public policy for the Government to subsidize the destruction of innocent unborn children. As Thomas Jefferson wrote, "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."

The National Right to Life Committee believes that the Supreme Court rulings permitting wholesale killing of the most defenseless members of the human family represent a radical retreat from our Nation's slow progress toward a society in which all human beings would be equal before the law.

So long as the most defenseless members of the human family can be killed in legally sanctioned abortion chambers—for any reason or for no reason—our society's purported commitments to equal protection and to protecting those who are most vulnerable remain hollow indeed.

For the Government to actually subsidize the violent destruction of unborn children compounds the injustice. Yet during the period between the Supreme Court's *Roe* v. *Wade* decision in 1973, and the time the Hyde amendment first took effect in 1977, the Federal Government paid for abortion on demand under the Medicaid Program.

It is indisputable that before enactment of the Hyde amendment, any Medicaid-eligible woman was entitled to an abortion, on request, with no questions asked. Under this policy, in fiscal year 1977, the Federal Medicaid Program paid for almost 300,000 abortions.

Since 1981 the Hyde amendment has permitted Federal Medicaid reimbursement for abortion only "where the life of the mother would be endangered if the fetus were carried to term."

According to the Department of Health and Human Service's latest annual report, in fiscal year 1984, 293 abortions were funded under the life of the mother exception. That is about one-tenth of one percent of the pre-Hyde amendment figure.

Only eight State legislatures currently choose to fund elective abortions. In addition, funding continues in Michigan because the legislature has narrowly failed to override the Governor's veto of a State Hyde amendment. Also, in five States—California, Connecticut, Massachusetts, New Jersey, and Vermont—elective abortions are being funded by order of State courts; some of these court orders eventually may be overturned.

I would note in passing that on October 14, 1981, Prof. Irvin M. Cushner, professor of obstetrics at the UCLA School of Medicine, testified before this subcommittee on behalf of various proabortion organizations, in opposition to the chairman's proposed prolife constitutional amendment. Professor Cushner said:

> The overwhelming majority of abortions in this country are performed on women who for various reasons do not wish to be pregnant at this time * * * I should say that 1 percent of the abortions being reported are being done as reported for physical health reasons.

I would only add that Dr. Cushner's one percent refers to physical health reasons broadly defined, and that under modern medical practice, situations in which the life of the mother is endangered by pregnancy are rarer still.

Mr. Chairman, opponents of the Hyde amendment argued that abortion was cost effective. Yes; callous as it may seem, Members of Congress have taken the floor of both Houses to argue, in sub-

stance, that it costs the Government less to pay for the killing of unborn children than to care for them once they are born.

I will give one specific example. The former Congresswoman from Queens who recently shared the national ticket of the Democratic Party made this statement in debate in opposition to the Hyde amendment on June 27, 1979:

> The cost of putting an unwanted child through the system far outweighs the cost of these abortion procedures.

Ms. Ferraro was more explicit in a magazine interview:

> It's a simple matter of economics. Unwanted children so often end up in the criminal justice system as offenders or as persons in need of supervision, and it's very expensive to take care of them.

I believe that some—although not all—of those who have used the cost/benefit line of argument were attempting to appeal to whatever vestiges of racism remain within these Halls. As the annual reports of the Federal Centers for Disease Control confirm, the abortion ratios for nonwhite groups are much higher than for whites. The ratio for whites is about one abortion per three live births; the ratio for nonwhites is about one abortion per two live births.

I think Washington Post columnist William Raspberry responded well to this line of argument. He wrote:

> The worst argument against the Hyde Amendment, in my view, is the economic argument—the one that says abortions ought to be funded by the government because abortion is cheaper than welfare. It also costs less to kill children than to educate them, but that's hardly a persuasive argument for infanticide.

The Government is not being generous to poor women when it offers to subsidize the destruction of their unborn children. We find a particular irony in the argument that abortion prevent child abuse. Abortion is, in fact, the ultimate in child abuse.

The money that would be used to fund abortions should be used to provide poor women with humane alternatives to abortion. The National Right to Life Committee has supported a number of federally funded programs which, in our view, offer indigent pregnant women real help, rather than the cruel "option" of destroying her unborn child. For example, we have supported increased funding for the women, infants, and children program, which provides nutritional services for mothers of unborn and newborn children. We played a role in enacting a tax deduction for expenses relating to adoption of special-needs children, and we support other adoption-law reforms.

Some of our State affiliates were instrumental in passing bills to extend AFDC benefits to poor women pregnant for the first time—even over the opposition of feminist groups who opposed such legislation as "granting status to the fetus."

I must also call the subcommittee's attention to the farflung network of alternatives-to-abortion centers. These centers provide practical assistance and emotional support to women who are experiencing crisis pregnancies. There are thousands of such centers in operation now, and new centers are opening rapidly. They are almost entirely privately funded and staffed by volunteers. This is one important component of the nationwide prolife movement.

Prior to enactment of the Hyde amendment, it was argued by some that cutting off public funding of abortion would force indigent women into the hands of back alley abortionists. The result, it was said, would be a tremendous increase in abortion-related morbidity and mortality.

In the summer of 1977, before the Hyde amendment went into effect, physicians at the Federal Centers for Disease Control estimated that as a result of the cutoff, between 44 and 90 women would die within 1 year, from botched abortions.

The CDC subsequently conducted several different studies, attempting through various methodologies to validate their "bloodbath" prediction. However, no such study revealed any statistically significant increase in abortion-related morbidity or mortality attributable to the Hyde amendment—as the CDC itself eventually had to acknowledge.

I will cite just one of these studies, conducted by the Texas Department of Health in cooperation with the CDC. Texas was one of the many States which conformed to the Federal policy and cut off funding of abortion except to save the life of the mother. Perhaps Texas was chosen for the study because much of the indigent population resides near the Mexican border, across which illegal abortions might be cheaply procured.

The results were published in the CDC's Morbidity and Mortality Weekly Report for June 6, 1980—and I ask, Mr. Chairman, that this CDC report be entered into the official record of this hearing.

Senator HATCH. Without objection it will be so entered.

[The report for June 6, 1980, follows:]

CENTER FOR DISEASE CONTROL

MMWR

MORBIDITY AND MORTALITY WEEKLY REPORT

June 6, 1980 / Vol. 29 / No. 22

Epidemiologic Notes and Reports

253 Restricting Federal Funds for Abortion – Texas
254 Pesticide Poisoning in an Infant – California
255 Health Status of Cuban Refugees
261 Measles in High School Students – Pennsylvania
262 Mushrooms Possibly Contaminated with Botulinal Toxin
263 Follow-up on Mount St. Helens

Epidemiologic Notes and Reports

Effects of Restricting Federal Funds for Abortion – Texas

In August 1977, federal funds for legally induced abortion for Title XIX (Medicaid)- and Title XX-eligible women were restricted. Texas became 1 of the 31 states that subsequently withdrew the use of state funds to finance legally induced abortion. Recently the Texas State Department of Health attempted to measure the impact of that decision in 4 ways.

The first method was to review in detail all abortion-related deaths occurring in Texas from 1975 through 1979. Since the restriction, 1 Medicaid-eligible woman in Texas died from septic complications of an illegal abortion (*1,2*). She had previously obtained 2 legally induced abortion procedures funded by Medicaid. This death occurred along the Texas-Mexican border, an area associated with higher reported rates of complications after illegal abortion (*3*).

Secondly, in a large metropolitan area of Texas, a review was undertaken of 600 consecutive hospital charts of women with abortion-related complications that caused them to seek emergency medical care. The chart review revealed no increase after the restriction, compared to the time interval before the restriction, in either the number or proportion of Medicaid- or Title XX-eligible women admitted for abortion complications. If a large proportion of women were resorting to illegal abortion, such complications would be expected to increase.

A third approach to measure the impact of the restriction was an attempt to estimate the number of legally induced abortions among Medicaid-eligible women which were not obtained because of the restriction. A model developed by Princeton University's Office of Population Research was used to examine the proportion of pregnancies among such women that were terminated by abortion before and after the restriction of public funds (*4*). The expected number of abortions for 1978 was derived by applying the proportion of pregnancies that were terminated by abortion within a 6-month interval in 1976 to the number of pregnancies in the corresponding 6-month interval in 1978. Based on these projections, an estimated 35% of pregnant Medicaid-eligible women who would have obtained a publicly funded, legally induced abortion before the funding restriction, did not obtain one afterwards.

Finally, continuation of pregnancy to term was assessed by comparing the fertility rate among Medicaid-eligible women, before and after the restriction, to the fertility rate among women not eligible for Medicaid in Texas. The fertility rate for the latter group increased 1.6% from 1976 to 1977 and 0.6% from 1977 to 1978. On the other hand, the fertility rate among Medicaid-eligible women increased 4.2% and 12.0% during the same periods, an increase consistent with the estimated percentage of pregnant Medicaid women not obtaining an induced abortion.

Abortion – Continued

Reported by M Chrissman, R Moore, Nova Health Systems, Inc., San Antonio, Texas; L Mondy, PhD, B Weber, MSW, Texas Dept of Human Resources; WP Peter, MD, PC Price, MD, CR Webb, Jr, MD, State Epidemiologist, Texas State Dept of Health; JR Trussell, PhD, J Menken, PhD, Princeton University, Princeton, New Jersey; Field Services Unit, and Abortion Surveillance Br, Family Planning Evaluation Div, Bur of Epidemiology, CDC.

Editorial Note: On February 19, 1980, the U.S. Supreme Court temporarily supported a lower-court ruling that restriction of federal funds for medically necessary abortions was unconstitutional. The ruling broadened the definition of "medically necessary abortion" to include the woman's age, her familial situation, and physical, emotional, and psychological factors relevant to her well-being. The final ruling on this issue is pending.

Several previous investigations have examined the health effects of the restriction of federal funding for abortions (*4,5*). The present study in Texas found more than one-third of the legal abortions expected among Medicaid-eligible women were not obtained in the postfunding restriction period. The data cited from the present study are consistent with those from a previous investigation in Texas, which found approximately 40% of the expected number of subsidized abortions were not being obtained in the interval after the funding restriction (*5*). Those low-income women who obtained legal abortions apparently paid for them through a combination of reduced clinic fees, public funds for ancillary services, and private sources (*5*).

In Texas, pregnant, low-income women who do not have federal or state funds for abortions do not appear to be resorting to illegal abortions to terminate unwanted pregnancies. These findings are consistent with those from a national monitoring system (*3*), which also could not document that the restriction of public funds for abortion caused a large percentage of Medicaid-eligible women to choose self-induced or non-physician-induced abortions.

This decrease in expected legal abortions, the absence of an increase in illegal abortion, and the rising fertility rate among Medicaid-eligible women in Texas all imply that a substantial portion of women who would have obtained a publicly-funded abortion before the restriction are now more likely to continue their pregnancies to term.

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2. MMWR 1978; 27:175.
3. Cates W Jr, Kimball AM, Gold J, et al. The health impact of restricting public funds for abortion October 10, 1977-June 10, 1978. Am J Public Health 1979; 69:945.
4. Trussell J, Menken J, Lindheim B, Vaughan B. The impact of restriction of Medicaid funding for abortion. Fam Plann Perspect (in press).
5. Rubin GL, Gold J, Cates W Jr. Response of low income women and abortion facilities to restriction of public funds for abortion: a study of a large metropolitan area. Am J Public Health 1979; 69:948-50.

Ms. James. The study showed that no increase in abortion-related complications or deaths could be linked to the Hyde amendment in this or subsequent studies—but "over one-third" of the babies who would have been aborted if public funding had been available were instead allowed to live.

Mr. Chairman, many opponents of the Hyde amendment, and of your bill, have employed one other major argument. The argument goes like this:

> I am not in favor of abortion. I think abortion is wrong. But since abortion has been legalized by the Supreme Court, it is discriminatory to deny to poor women what women with money can obtain.

This is perhaps the most specious argument of all. The argument makes sense only if one regards abortion as a good thing—in the sense that having access to a surgeon who can remove a diseased organ is a good thing, even though it is an experience that one would rather avoid.

But the argument makes no sense at all if one truly regards abortion as a social evil.

Consider an analogy. In most locales it is legal to own a handgun. Wealthy persons can afford high-quality handguns. Such expensive weapons are beyond the reach of many low-income citizens, who consequently are left without a weapon for self-defense, or who must settle for a cheap handgun, of the type that may blow up and injure the user.

Is the Government then obligated to purchase high-quality Smith and Wesson revolvers for indigent persons? One who believes that private ownership of handguns is a social evil would logically answer:

> No. These weapons are legal, but the Government certainly should not subsidize the proliferation of such weapons.

Only one who believes that private ownership of handguns is a good idea would entertain the notion of subsidizing pistols for the poor.

Similar analogies could be made to other goods and services which are legally available, but which are regarded by many as social evils. Please understand that I am not making any comment on the gun issue or any other issue except Federal funding of abortion. Nor am I equating any other issue with the gravity of the abortion issue. I am merely pointing out the logical inconsistency of some of those who say that they believe that abortion is a social evil, but also say that it would be unjust for the Government to refuse to subsidize that evil.

Current law regarding abortion is, indeed, discriminatory. It discriminates against the unborn child of those women and men who can afford the fees charged at the abortion chambers which flourish under the protection of *Roe* v. *Wade*. The Hyde amendment has saved hundreds of thousands of lives. But when *Roe* v. *Wade* is overturned, then the legislatures of this Nation can save the lives of millions.

Mr. Chairman, when this subject is debated, proabortion advocates sometimes assert that those of us who oppose funding of abortions do not understand the difficult circumstances that a poor woman may face when she finds herself with a crisis pregnancy. Sometimes it is said that we are lacking in compassion.

I know from my own experience, from my own extensive involvement in the prolife movement, including working with the crisis pregnancy center in Richmond, VA, that such representations are unfair. We recognize that unintended pregnancy can cause many difficulties.

Mr. Chairman, I think especially of one woman who had four children and who became pregnant in difficult circumstances. Her husband physically abused her. Her husband did not support the family financially. I think that all these problems came out of a disease which he suffered called alcoholism.

Senator, I think that it is important to understand that this man removed his wife from her support systems, from her family, from her church, from her friends, and took her to another city where she was not surrounded by those people who cared for her.

I think it is important to understand that this poor woman could not afford medical services at that time. I think it is also important to know that that woman gave birth 36 years ago on the kitchen table in her very humble home. Senator, I have every ounce of compassion for the difficult circumstances in which that poor woman found herself—because that poor woman was my mother.

Mr. Chairman, my mother could have used many types of assistance at that time and at some later time, but she would not have considered it an act of generosity if the Government had offered to pay to get rid of me.

There are some so-called solutions to difficult situations which cannot really be considered options in a just and humane society, and I sincerely believe that abortion is one of these.

Mr. Chairman, I thank you sincerely again for this opportunity and I thank you for your indulgence if I have gone overtime. I will do my best to respond to any questions which you may have.

Senator **HATCH**. I want to thank you for your articulate statement, Ms. James.

As you know, S. 522 will make the Hyde amendment permanent law.

Accordingly it is important to examine some of the policy items raised in connection with the Hyde amendment. In that context would this bill discriminate against women or against the poor?

Ms. **JAMES**. Let me start off by saying I guess maybe today is the day for telling personal stories. I too have been very active in the civil rights movement and paid my dues in that respect. If I had any inkling of any idea that this particular amendment would in any way discriminate against women or the poor, I would not be sitting at this table—absolutely, emphatically not.

I would say that it is an interesting issue to think that it could discriminate against women. Obviously, many cannot get pregnant and obviously cannot have abortions.

I would say that it concerns me that at least half of the unborn children being aborted in this country are very, very, very young women, and so obviously in some real sense abortion does discriminate against that group of young women.

I think as the gun analogy I used earlier illustrates, there are many things, Mr. Chairman, which are legal in this country that we do not need to feel obligated to subsidize. I think it is important to keep in mind that Congress has no obligation to fund every right provided for in the Constitution, or dreamed up by the Supreme Court.

So my answer to you would be an emphatic No. It would not discriminate.

Senator Hatch. In the initial Hyde amendment, opponents of the amendment attacked it by saying that it might lead to more mortality and morbidity related to illegal abortions.

Did this in fact happen? What has been our experience under the Hyde amendment for the last 8 years or so that it has been annually enacted?

Ms. James. No; it did not happen, and I refer to one of the studies in Texas. Let me just share with you part of what I asked to be entered into the record but did not share previously.

In that particular study in Texas:

> Pregnant low-income women who do not have Federal or State funds for abortion do not appear to be resorting to legal abortions to terminate unwanted pregnancies. These findings are consistent with those from the national monitoring system which also could not document that the restriction of public funds for abortions caused a large percentage of Medicaid eligible women to choose selfinduced or nonphysician induced abortions—

Which would, of course, increase the rate of morbidity.

And so I think that the studies we have looked at, everything that we have seen so far, indicate that, no, it does not increase maternal mortality or morbidity.

Senator Hatch. Opponents of the Hyde amendment argue we ought to be neutral concerning abortion choices.

Do restrictions on abortion funding disturb or promote neutrality of abortion choices?

Ms. James. I have always found that a little bit interesting, that we think that the Government ought to be neutral on that issue.

Of course, I do not believe that the Government should be neutral regarding the issue of abortion or unborn children at all. Even the U.S. Supreme Court ruled in 1980, in upholding the Hyde amendment, that the Government could seek to encourage childbirth over abortion.

It is difficult to understand how some of the proabortion groups can argue that abortion is "a deeply personal matter"—and then, in the same breath, insist that neutrality requires the Government to subsidize abortion.

Senator Hatch. There may be a symbolic correlation between this abortion funding bill and civil rights.

The legal effect of this bill, however, is confined to enacting preference for childbirth over abortion in our Federal subsidy policies. Is that your understanding?

Ms. James. Yes, yes; Mr. Chairman, that is my understanding of this particular bill.

For years prolife attorneys tried to find the best way to enact a comprehensive ban on funding of abortions, and I think that this particular bill is probably the best way to do that.

Title VI is such a blanket statute that by amending title VI, your bill will achieve that goal.

Senator **Hatch**. Would you agree with me, then, that this bill does not confer personhood on an unborn human, or in any way upset the *Roe* v. *Wade* decision?

Ms. **James**. It does not. I absolutely agree with that.

Senator **Hatch**. I want to thank you for appearing before the committee. I thought your statement was very articulate and very appropriate under the circumstances.

Thank you so much for appearing.

Ms. **James**. Thank you.

[The prepared statement of Ms. James follows:]

PREPARED STATEMENT OF KAY JAMES

Mr. Chairman, distinguished members of the subcommittee: I am Kay James, director of public affairs for the National Right to Life Committee.

I thank you, Mr.Chairman, for this opportunity to testify on behalf of the National Right to Life Committee, in support of S. 522, the Abortion Funding Restriction Act.

The National Right to Life Committee, formed in 1973, is the nation's major pro-life organization. I speak for our 50 state affiliates and over 2,000 local Right to Life chapters.

Since its inception, the mission of the National Right to Life Committee has been to defend innocent human beings whose right to life is threatened or denied by legal abortion, infanticide, or euthanasia.

THE ABORTION FUNDING RESTRICTION ACT

The National Right to Life Committee looks forward to the day when full legal protection will be restored to unborn children in America. The Supreme Court's grievous 1973 Roe v. Wade ruling must be overturned. I know that is a goal which you share, Mr. Chairman.

But the proposal before the subcommittee today, S. 522, has a far more limited goal. The sole purpose of S. 522 is to effectively and permanently prohibit federal funding of abortion, except to save the life of the mother.

Since 1976, the Congress has restricted funding of elective abortions under Medicaid through the "Hyde Amendment," a rider to the annual Labor/HHS appropriations bill. Your bill, Mr. Chairman, would make that policy permanent law.

S. 522 is an amendment to the Civil Rights Act of 1964. It is appropriate that such a permanent prohibition on federal funding of abortion be placed within Title VI of the Civil Rights Act. Unborn children are living members of the human family, but they are currently regarded as little more than chattel--property--under the decrees of the Supreme Court.

It is of substantive importance that the Hyde Amendment be made permanent, thus placing the current policy against funding abortions beyond the vagaries of the annual appropriations process and the ever-changing procedural rules governing appropriations bills.

Symbolically, it is quite appropriate to place such a restriction within Title VI of the Civil Rights Act.

Mr. Chairman, as our name indicates, the National Right to Life Committee has always regarded itself as a civil rights organization. And, we regard the issue of abortion as a civil rights issue in the most profound sense. By enacting a permanent policy that the federal government will not subsidize the destruction of unborn human beings, and placing that policy within the Civil Rights Act, the Congress would be making an implicit statement that abortion is not simply another "medical procedure," but rather, is a life-destroying procedure which the Congress will not subsidize. This bill establishes a federal public policy preference for childbirth over abortion.

MISREPRESENTATIONS OF S. 522

However, S. 522 represents only a small step towards restoring affirmative legal protection to unborn children.

I will leave detailed discussion of the legal aspects of S. 522 to Mr. Bopp. I would only observe that some pro-abortion advocacy groups have presented this subcommittee with extravagant misinterpretations of S. 522. Even though S. 522 consists of one sentence which addresses only the use of federal funds to perform abortions, these groups have insisted that in some mysterious fashion the bill would confer legal "personhood" on unborn children.

The National Right to Life Committee supports constitutional amendments and other legislation which would establish legal personhood for unborn children, but S. 522 is not intended to do anything other than curb federal funding of abortion. The bill prohibits only the direct use of federal financial assistance for abortion; it does not prohibit recipients from funding abortions from other sources. The bill confers no substantive rights on unborn children.

The pro-abortion organizations which engage in these far-fetched extrapolations on the simple text of S. 522 understand very well that a majority in each house of Congress opposes federal funding of abortion, except to save the life of the mother. Therefore, they would rather not debate a "permanent Hyde Amendment" bill, such as S. 522, on its merits. Instead they wish to shift the focus to the "personhood" issue, and invoke fantasies regarding the registration of pregnancies and miscarriages with federal pregnancy police.

THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Some of these groups, such as the Leadership Conference on Civil Rights, insist that they have "no position" on abortion. But somehow they seem to find reasons to oppose most major pieces of anti-abortion legislation which begin to move through the Congress.

I have a copy of a letter to the Chairman of the full Judiciary Committee, dated April 2, in which 20 advocacy organizations opposed S. 522 on the grounds that it "could open the door for the Civil Rights Act to become little more than a vehicle for every controversial cause."

Mr. Chairman, I am old enough to recall that the Civil Rights Act of 1964 itself was quite controversial in its time. Since its initial enactment, it has been amended many times, and many of the amendments have been somewhat controversial--including the Pregnancy Discrimination Act of 1978. That Act amended Title VII of the Civil Rights Act to require employers to provide pregnancy-related benefits. This provision contains an explicit exception for abortion.

Mr. Chairman, on July 15 Senator Kerry and other senators introduced S. 1432, the so-called "Civil Rights Amendments Act." That legislation would amend numerous provisions of the Civil Rights Act of 1964--including Title VI--to prohibit "discrimination on the basis of affectional or sexual orientation." The Kerry bill involves an issue completely outside of the purview of the National Right to Life Committee--but we will watch with great interest to see if the NAACP, the Leadership Conference on Civil Rights, and the other groups which have objected to your bill on the basis that it interjects a controversial subject unrelated to race into Title VI, will oppose Senator Kerry's bill with equal vigor, on the same basis.

If not, then perhaps the sincerity of their "non-position" on abortion should be questioned.

SHOULD THE FEDERAL GOVERNMENT FUND ABORTIONS?

Mr. Chairman, having disposed of a few red herrings, allow me to now briefly address the underlying public policy issue: Should the federal government be in the business of funding abortion?

In our view, it would be atrocious public policy for the government to subsidize the destruction of innocent unborn children. As Thomas Jefferson wrote, "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."

Eminent legal scholars such as Prof. John T. Noonan, Jr., of the University of California-Berkeley, and Prof. Victor Rosenblum of Northwestern University, have thoroughly exploded the pro-abortion fabrication that anti-abortion legislation was a 19th-century innovation motivated mainly by a concern with protecting women from quack abortionists.

In fact, protection for unborn children is firmly grounded in our common-law heritage. Indeed, as Prof. Noonan wrote, sanctions against abortion were almost universal in the history of Western civilization, until very recent times.

The National Right to Life Committee believes that the Supreme Court rulings permitting wholesale killing of the most defenseless members of the human family, represent a radical retreat from our nation's slow progress towards a society in which all human beings would be equal before the law.

So long as the most defenseless members of the human family can be killed in legally sanctioned abortion chambers--for any reason or for no reason--our society's purported commitments to equal protection and to protecting those who are most vulnerable, remain hollow indeed.

For the government to actually subsidize the violent destruction of unborn children compounds the injustice. Yet during the period between the Supreme Court's Roe v. Wade decision in 1973, and the time the Hyde Amendment first took effect in 1977, the federal government paid for abortion on demand under the Medicaid program.

The Congress never voted to authorize funding of abortions. The Department of Health, Education, and Welfare simply commenced paying for abortion after the Supreme Court decision--as if abortion were simply another medical procedure.

The Medicaid-funded abortions were referred to as "medically necessary," but "medically necessary" in this context is simply a legal and administrative term of art which meant, in practice, abortion on demand. This was acknowledged on the floor of the Senate by opponents of the Hyde Amendment, such as then-Senator Brooke. An absolutely open-ended definition of "medically necessary" was accepted by the federal courts during the extensive litigation over the constitutionality of the Hyde Amendment.

So, it is really indisputable that before enactment of the Hyde Amendment, any Medicaid-eligible woman was entitled to an abortion, on request, with no questions asked. Under this policy, in Fiscal Year 1977, the federal Medicaid program paid for almost 300,000 abortions.

For several years exceptions for cases of rape and incest were added to the Hyde Amendment. Very few abortions were funded under these exceptions, since only a fraction of 1% of all children are conceived under such unfortunate circumstances.

Since 1981 the Hyde Amendment has permitted federal Medicaid reimbursement for abortion only "where the life of the mother would be endangered if the fetus were carried to term."

According to the Department of Health and Human Services's latest annual report, in Fiscal Year 1984, 293 abortions were funded under the "life of the mother" exception. That is about one-tenth of one percent of the pre-Hyde Amendment figure.

Only eight state legislatures currently choose to fund elective abortions. In addition, funding continues in Michigan because the legislature has narrowly failed to override the governor's veto of a state "Hyde Amendment." Also, in five states (California, Connecticut, Massachusetts, New Jersey, and Vermont), elective abortions are being funded by order of state courts; some of these courts orders eventually may be overturned.

THE "HARD CASES"

Many abortion advocates prefer to discuss rape, incest, and risk to the mother's life as if these were common reasons for abortion. But some of the franker defenders of abortion have acknowledged that almost all abortions are performed for social reasons.

To cite just one example: On Oct. 14, 1981, Professor Irvin M. Cushner, professor of obstetrics at the UCLA School of Medicine, testified before this subcommittee on behalf of various pro-abortion organizations, in opposition to the Chairman's proposed pro-life constitutional amendment. Professor Cushner said:

> "The overwhelming majority of abortions in this country are performed on women who for various reasons do not wish to be pregnant at this time...I should say that 1 percent of the abortions being reported are being done as reported for physical health reasons."[1]

I would only add that Dr. Cushner's "one percent" refers to "physical health reasons" broadly defined, and that under modern medical practice, situations in which the life of the mother is endangered by pregnancy are rarer still.

ARGUMENTS FOR FEDERAL FUNDING OF ABORTION

During the congressional debates over the Hyde Amendment, advocates of federal funding of abortion have employed four major arguments.

First, they said it was unconstitutional. But in 1980, the Supreme Court, by a 5 to 4 vote, decided that the Constitution did not require the government to fund a violent act which it had been a felony to perform, in almost every state, a few short years before.

Secondly, opponents of the Hyde Amendment argued that abortion was cost effective. Yes, callous as it may seem, members of Congress have taken the floor of both houses to argue, in substance, that it costs the government less to pay for the killing of unborn children than to care for them once they are born.

I will give one specific example. The former congresswoman from Queens, who recently shared the national ticket of the Democratic Party, made this statement in debate in opposition to the Hyde Amendment on June 27, 1979:

> "The cost of putting an unwanted child through the system far outweighs the cost of these [abortion] procedures."

Ms. Ferraro was more explicit in a magazine interview:

> "It's a simple matter of economics. Unwanted children so often end up in the criminal justice system as offenders or as persons in need of supervision, and it's very expensive to take care of them."[2]

I believe that some (although not all) of those who have used the cost/benefit line of argument were attempting to appeal to whatever vestiges of racism remain within these halls. As the annual reports of the federal Centers for Disease Control confirm, the abortion ratios for nonwhite groups are *much* higher than for whites. The ratio for whites is about one abortion per three live births; the ratio for nonwhites is about one abortion per *two* live births.

I think *Washington Post* columnist William Raspberry responded well to this line of argument. He wrote:

> "The worst [argument against the Hyde Amendment], in my view, is the economic argument--the one that says abortions ought to be funded by the government because abortion is cheaper than welfare. It also costs less to kill children than to educate them, but that's hardly a persuasive argument for infanticide."[3]

The government is not being generous to poor women when it offers to subsidize the destruction of their unborn children. We find a particular irony in the argument that abortion prevents *child abuse*. Abortion is, in fact, the ultimate in child abuse.

ALTERNATIVES TO ABORTION

The money that would be used to fund abortions should be used to provide poor women with humane alternatives to abortion. The National Right to Life Committee has supported a number of federally funded programs which, in our view, offer indigent pregnant women real help, rather than the cruel "option" of destroying her unborn child. For example, we have supported increased funding for the Women, Infants, and Children (WIC) program, which provides nutritional services for mothers of unborn and newborn children. We played a role in enacting a tax deduction for expenses relating to adoption of special-needs children, and we support other adoption-law reforms.

Some of our state affiliates were instrumental in passing bills to extend AFDC benefits to poor women pregnant for the first time--even over the opposition of feminist groups who opposed such legislation as "granting status to the fetus."

I must also call the subcommittee's attention to the far-flung network of alternatives-to-abortion centers. These centers provide practical assistance and emotional support to women who are experiencing crisis pregnancies. There are thousands of such centers in operation now, and new centers are opening rapidly. They are almost entirely privately funded and staffed by volunteers. This is one important component of the nationwide pro-life movement.

DOES RESTRICTING FEDERAL FUNDING OF ABORTION FORCE POOR WOMEN TO OBTAIN DANGEROUS ILLEGAL ABORTIONS?

Prior to enactment of the Hyde Amendment, it was argued by some that cutting off public funding of abortion would force indigent women into the hands of back alley abortionists. The result, it was said, would be a tremendous increase in abortion-related morbidity and mortality.

In the summer of 1977, before the Hyde Amendment went into effect, physicians at the federal Centers for Disease Control estimated that as a result of the cutoff, between 44 and 90 women would die within one year, from botched abortions.[4]

The C.D.C. subsequently conducted several different studies, attempting through various methodologies to validate their "bloodbath" prediction. However, no such study revealed any statistically significant increase in abortion-related morbidity or mortality attributable to the Hyde Amendment--as the C.D.C. itself eventually had to acknowledge.

I will cite just one of these studies, conducted by the Texas Department of Health in cooperation with the C.D.C.. Texas was one of the many states which conformed to the federal policy and cut off funding of abortion except to save the life of the mother. Perhaps Texas was chosen for the study because much of the indigent population resides near the Mexican border, across which illegal abortions might be cheaply procured.

The results were published in the C.D.C.'s Morbidity and Mortality Weekly Report for June 6, 1980 (and I ask, Mr. Chairman, that this C.D.C. report be entered into the official record of this hearing).

The study concluded:

> "The present study in Texas found more than one-third of the legal abortions expected among Medicaid-eligible women were not obtained in the postfunding restriction period. The data cited from the present study are consistent with those from a previous investigation in Texas, which found approximately 40% of the expected number of subsidized abortions were not being obtained in the interval after the funding restriction...
>
> "In Texas, pregnant, low-income women who do not have federal or state funds for abortions do not appear to be resorting to illegal abortions to terminate unwanted pregnancies. These findings are consistent with those from a national monitoring system, which also could not document that the restriction of public funds for abortion caused a large percentage of Medicaid-eligible women to choose self-induced or non-physician-induced abortions.
>
> "This decrease in expected legal abortions, the absence of an increase in illegal abortion, and the rising fertility rate among Medicaid-eligible women in Texas all imply that a substantial portion of women who would have obtained a publicly funded abortion before the restriction are now more likely to continue their pregnancies to term."

Thus, no increase in abortion-related complications or deaths could be linked to the Hyde Amendment in this or subsequent studies--but "over one-third" of the babies who would have been aborted, if public funding had been available, were instead allowed to live.[5]

ACCESSIBILITY OF ABORTION

This is merely one more confirmation of the common sense expectation that the more accessible abortion is--geographically, economically, or whatever--the more abortions there will be. The Alan Guttmacher Institute, an affiliate of the Planned Parenthood Federation of America, has estimated that over one-half million additional abortions would be performed annually, in the U.S., if only legal abortion facilities were opened in more locales. The Guttmacher Institute considers this to be an "unmet need" for abortions.

In blatant contradiction, Planned Parenthood argues that making abortion illegal--which would shut down all the thousands of legal abortion facilities--would not reduce the incidence of abortion, but would only turn legal abortions into illegal abortions. They can't have it both ways.

IS IT "DISCRIMINATORY" TO DENY FUNDING FOR ABORTIONS?

Mr. Chairman, many opponents of the Hyde Amendment, and of your bill, have employed one other major argument. The argument goes like this: "I'm not in favor of abortion. I think abortion is wrong. But since abortion has been legalized by the Supreme Court, it is discriminatory to deny to poor women, what women with money can obtain."

This is perhaps the most specious argument of all. The argument makes sense only if one regards abortion as a good thing--in the sense that having access to a surgeon who can remove a diseased organ is a good thing, even though it is an experience that one would rather avoid.

But the argument makes no sense at all if one truly regards abortion as a social evil.

Consider an analogy. In most locales, it is legal to own a handgun. Wealthy persons can afford high-quality handguns. Such expensive weapons are beyond the reach of many low-income citizens, who consequently are left without a weapon for self-defense, or who must settle for a cheap handgun, of the type that may blow up and injure the user.

Is the government obligated to purchase high-quality Smith and Wesson revolvers for indigent persons? One who believes that private ownership of handguns is a social evil would logically answer: "No. These weapons are legal, but the government certainly should not subsidize the proliferation of such weapons."

Only one who believes that private ownership of handguns is a good idea, would entertain the notion of subsidizing pistols for the poor.

Similar analogies could be made to other goods and services which are legally available, but which are regarded by many as social evils.

Please understand that I am not making any comment on the gun issue or any other issue, except federal funding of abortion. Nor am I equating any other issue with the gravity of the abortion issue. I am merely pointing out the logical inconsistency of some of those who say they believe that abortion is a social evil, but also say that it would be unjust for the government to refuse to subsidize that evil.

Current law regarding abortion is, indeed, discriminatory. It discriminates against the unborn children of those women and men who can afford the fees charged at the abortion chambers which flourish under the protection of Roe versus Wade. The Hyde Amendment has saved hundreds of thousands of lives. But when Roe versus Wade is overturned, then the legislatures of this nation can save the lives of millions.

Mr. Chairman, when this subject is debated, pro-abortion advocates sometimes assert that those of us who oppose funding of abortions do not understand the difficult circumstances that a poor woman may face when she finds herself with a crisis pregnancy. Sometimes it is said that we are lacking in compassion.

I know from my own extensive involvement in the pro-life movement, including work with a crisis pregnancy center in Richmond, Virginia, that such representations are unfair. We recognize that unintended pregnancy can cause many difficulties.

I think especially of one woman who had four children, and who became pregnant in difficult circumstances. Her husband was an alcoholic--which contributed to a whole host of other problems.

Because her husband did not provide financial support for this woman or her children, she could not afford adequate medical care during her pregnancy. She gave birth to her baby on her kitchen table, in a humble home in Portsmouth, Virginia.

Mr. Chairman, that woman was my mother, and that baby was me.

My mother could have used many types of assistance at that time, and at some later times. But she would not have considered it an act of generosity if the government had offered to pay to get rid of me. There are some so-called solutions to difficult situations which cannot really be considered options in a just and humane society, and abortion is one of these.

Mr. Chairman, I thank you again for this opportunity, and I thank you for your indulgence if I have gone overtime. I will do my best to respond to any questions which you may have.

NOTES

[1] Hearings Before the Subcommittee on the Constitution on Bills Proposing a Constitutional Amendment with Respect to Abortion, Vol. 1, pp. 158-59 (Serial No. J-97-62).

[2] Ms. magazine, January, 1979.

[3] Des Moines Register, Dec. 16, 1977.

[4] American Journal of Public Health, Sept. 28, 1977.

[5] See also "The Health Impact of Restricting Public Funds for Abortion, American Journal of Public Health, Sept. 1979.

Senator Hatch. Let me at this particular point submit for the record several important articles relevant to this subject.

[Articles follow:]

Reprinted by the
U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
from AMERICAN JOURNAL OF PUBLIC HEALTH
Vol. 69, No. 9, September 1979

The Health Impact of Restricting Public Funds for Abortion October 10, 1977-June 10, 1978

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GEORGE L. RUBIN, MD, JACK C. SMITH, MS, ROGER W. ROCHAT, MD,
AND CARL W. TYLER, JR., MD

Abstract: The Center for Disease Control (CDC), Atlanta, Georgia implemented an eight-month prospective surveillance system in 24 hospitals distributed among states with and without public funding for abortion. Out of 3,157 visits for abortion-related complications, only 10 women gave a history of non-physician or self-induced abortion and none were Medicaid recipients. The small number of hospitals located in non-funded states and the smaller numbers of women served in these hospitals than in the funded states limited the power of our study. Women living along the Texas-Mexico border appeared more likely to have complications after illegal abortions than women from other areas of the country. (*Am J Public Health* 69:945-947, 1979.)

After August 4, 1977, federal Medicaid funds were restricted for abortion, except in certain situations. In fiscal year 1977, 295,000 abortions had been financed by federal funds through the Medicaid program;[1] thus, approximately 300,000 women might have been affected by this change in funding policy. The Center for Disease Control (CDC) undertook a project designed to monitor the health effects of this funding restriction.

In 1972, the year prior to the United States Supreme Court decisions, illegal abortion had been responsible for 39 deaths nationwide, whereas five years later only two fatalities resulted from illegal abortion.[2, 3] We hypothesized that this favorable public health trend might be reversed if a large percentage of Medicaid-eligible women resorted to the options of self-induced or non-physician-induced abortion.

Methods

We collected prospective surveillance data between October 10, 1977 and June 10, 1978 from 24 institutions located in 14 states and the District of Columbia. We used four criteria to choose institutions:

- performing of more than 1,000 abortions in 1976,
- having a large obstetric acute care facility,
- either serving a high proportion of Medicaid-eligible women, or being located in regions where previous Medicaid-associated complications had occurred, and
- agreeing to report abortion complications on a regular basis. Seven additional solicited hospitals were not able to provide regular data.

Institutions were classed as "funded" if they were located in states which funded abortions under broad medical indications or "non-funded" if they were located in states which funded abortions only in circumstances where the pregnancy endangered the life of the woman, resulted from rape or incest, or might result in long-lasting health damage to the woman.

The number of women with abortion complications treated by the institutions the previous week were reported weekly to CDC. Age, race, source of the abortion, gestational age at the time of the abortion, and Medicaid status of the woman were also reported. We defined abortion complications to include any illness related to an induced or spontaneous abortion that caused a woman to come to the acute care facility; in general, they were categorized under HICD-A code numbers 640-646.[4]

To determine the secular trends in abortion complications before funding restrictions, we conducted a chart review at 19 of the 24 participating institutions.* Data were collected by CDC staff from all hospital admissions for abortion complications between January 1 and December 31, 1977, and included the same variables as the reported data.

Results

From the prospective surveillance, 3,157 abortion-related complications were reported. Twenty-seven per cent of all women were Medicaid-recipients. Women from institutions in non-funded states were slightly younger, more likely to be white, had a slightly greater percentage of complica-

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Editor's Note: See also related articles on page 929 and page 948, this issue.

*We were unable to conduct the chart review in five institutions either because their administration felt it might invade patient privacy or because their medical record system did not allow retrieval of charts by the H-ICDA code numbers. Of the five institutions with no chart review, three were in non-funded states, while two were in funded states.

TABLE 1—Characteristics of Women with Abortion Complications by State Funding Status, October 10, 1977–June 10, 1978

	Funded	Non-Funded
Total Number	2407	750
Mean Age	24.6 yrs	23.6 yrs
Race		
White	47%	57%
Black & Other	53%	43%
Category of Abortion		
Induced	20%	23%
Spontaneous	80%	77%
Mean Gestation	11.0 wks	11.7 wks

tions after induced abortions, and a significantly later mean gestational age than women from institutions in funded states (Table 1).

Of the 3,157 complications prospectively reported through our hospital surveillance system, seven occurred to women who gave a history of having illegally induced procedures. In three other instances, women were unwilling to name the source of their abortion; we assumed these women also underwent an illegal or self-induced abortion. None of these 10 complications occurred in women reported to be a Medicaid recipient. No abortion deaths related to either illegal or legal abortion were detected through the reporting system.

Eight of the 10 complications after illegal abortion were reported from hospitals along the Texas-Mexico border. Six of these eight women were Hispanic. The proportion of reported complications from illegal abortions from institutions located along the Texas-Mexico border was nearly 75 times higher than the proportion in states which were continuing public funds *and* were not located along the border (Table 2). The proportion of complications due to illegal abortion did not differ significantly between institutions located in non-funded states not along the Texas-Mexico border and institutions in funded states.

Institution in funded and non-funded states did not significantly differ in the proportion of Medicaid-eligible women with abortion complications. Moreover, institutions in non-funded states did not experience any significant increase in the proportion of Medicaid-eligible women with abortion complications during the eight months of observation.

In non-funded states, Medicaid women with complications after legally induced abortion had a 1.9-week later mean gestational age than their counterparts in funded states ($p = 0.07$). Moreover, Medicaid-eligible women in non-funded states had a 2.4-week later mean gestational age than non-Medicaid-eligible women in the same state ($p < 0.01$); in funded states, Medicaid-eligible and non-Medicaid-eligible women had similar mean gestational ages (Table 3).

Analysis of data from the chart review for the calendar year 1977 yielded findings similar to those obtained from surveillance. Of 3,087 admissions from abortion complications, 13 occurred either after illegal abortion or in patients who refused to name the source of the abortion. Nine of these 13 complications occurred in the single institution along the Texas-Mexico border in which chart review was conducted. The other four complications occurred in institutions located in states which were providing public funds for abortion at the time. In five of the seven institutions in non-funded states where chart review was performed, the percentage of abortion complications in Medicaid-eligible women increased after public funds were restricted; in two such institutions the percentage decreased. None of these temporal differences was statistically significant. Medicaid-eligible women in non-funded states who were hospitalized for complications after legally induced abortion had a later mean gestational age after the funding cutoff than before, although this difference was not significant. Thus, the data gained from the chart review tended to support the findings from the prospectively reported data.

Discussion

In this selected sample of institutions, restriction of public funds for abortion did not cause enough Medicaid-eligible women to choose non-physician or self-induced abortion so that we could detect such an occurrence.

Factors beyond our control affected the number of observations we were able to collect from non-funded states and thus limited the power of our study. We attempted to get

TABLE 2—Ratio of Reported Abortion Complications after Illegal Abortion, by State Funding Status and Location of Institutions, October 10, 1977–June 10, 1978

Category	Total Abortion Complications	Illegal Abortion Complications	Ratio[*]	RR[†]
Funded	2407	1	0.4	1.0
Non-Funded,				
Non-Texas Border	493	1	2.0	4.9 (0.4–50.5)
Non-Funded,				
Texas Border	257	8	31.1	74.9 (26.2–213.9)

[*] Reported illegal abortion complications per 1000 reported total complications.

[†] Risk of reported illegal abortion complications compared to "expected" level in funded states. 95% confidence intervals in parentheses; where they do not overlap 1.0, results are significant at the $p < 0.05$ level.

TABLE 3—Mean Gestational Age[1] for Women with Complications after Legally Induced Abortion, by State Funding Status and Patient Medicaid Status, October 10, 1977–June 10, 1978

Medicaid Status	State Funding Status Funded (n = 418)	 Non-Funded (n = 100)
Medicaid	11.0*	12.9
Non-Medicaid	11.3	10.5**
Unknown	11.3	13.8

[1] In menstrual weeks, excluding women for whom the gestational age was unknown.

*p = 0.07 | Compared to gestational age of 12.9 for Medicaid-eligible women in non-funded states
**p < 0.01

equal numbers of institutions in states which had restricted or had continued public funding for abortion. However, because judicial decisions in several states overturned legislative restrictions of public funds, only 10 of our hospitals were located in states which restricted public funds during the study interval while 14 were located in states which continued to provide public funding. Moreover, institutions in non-funded states tended to serve smaller numbers of women in their obstetric acute-care facilities than those in funded states and thus reported only one-third as many abortion complications as those in funded states.

We had enough observations in non-funded states to have had a 90 per cent probability of detecting a 50 per cent rise in abortion complications among Medicaid-eligible women. Based on previous estimates of the risks of illegal abortion,[1] if 5 per cent of all pregnant Medicaid-eligible women resorted to illegally induced abortion, rather than to legally induced abortion, this situation would have occurred.

However, at least two methodologic features in the research design would bias our results toward being unable to measure a real difference: 1) although we categorized our hospitals as either funded or non-funded depending on the status of funding at the state level, some hospitals elected to use non-federal public funds to subsidize legal abortions even in the absence of state funds; 2) Medicaid-eligible women may be choosing to have illegally induced abortions, and suffering complications, but not going to the hospitals we monitored.

When complications after illegal abortion were detected, they occurred mostly in institutions located along the Texas-Mexico border. These data imply that there are unique circumstances along the border which affect the likelihood of women using illegal channels to terminate their pregnancies. None of these findings can be reasonably explained by the August 1977 restriction of public funds for abortion in Texas. One possible explanation may be a local tradition of obtaining non-physician obstetrical care.[5] Alternatively, women located along the Texas-Mexico border may be more likely to report an illegal abortion.

Our study did not provide data to explain the reason for the later gestational age after legally induced abortions in Medicaid-eligible women observed in non-funded states. For each week of delay, the risk of complications after legally induced abortion increases approximately 20 per cent; the risk of death increases approximately 40 per cent.[6, 7] Thus, if as the data suggest, Medicaid-eligible women are delaying one to two weeks because of lack of public funds, they are increasing their risks of both complications and deaths from their procedures.

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ACKNOWLEDGMENTS

The authors wish to thank the following individuals for their contributions to the project, and especially for their persistence in the data collection efforts: Martha Cowart, Melinda Fluck, Diana Petitti, MD, Woodruff J. English II, MD, Dana D. Brian, MD, Uta Landy, PhD, Giorgio Bensussi, MD, members of the Statistical Services Branch and clerical staff of the Family Planning Evaluation Division, CDC.

The following individuals were primarily responsible for the data collection efforts within their respective institutions: D. Thompson, MD, Magee Womens Hospital, Pittsburgh, PA; B. Lieberman, MD, Bellevue Hospital, New York, NY; J. Batts, Jr., MD, Harlem Hospital, New York, NY; J. Polin, MD, University of Pennsylvania Medical Center, Philadelphia, PA; P. Darney, MD, Boston Hospital for Women, Boston, MA; R. Buchanan, RN, Johns Hopkins Hospital, Baltimore, MD; J. Tomakowski, Hutzel Hospital, Detroit, MI; W. Wilson, MD, Denver General Hospital, Denver, CO; R. Sweet, MD, San Francisco General, San Francisco, CA; R. Bragonier, MD, Harbor General Hospital, Torrance, CA; N. Winn, MD, Kapiolani Hospital, Honolulu, HI; R. Rajan, MD, Temple University Hospital, Philadelphia, PA; U. Freese, MD, Cook County Hospital, Chicago, IL; S. Jones, MD, DC General Hospital, Washington, DC; J. Duenholter, MD, Parkland Hospital, Dallas, TX; J. Palomaki, MD, University Hospital, Cleveland, OH; E. Gold, MD, Women and Infants Hospital, Providence, RI; D. Ucker, MD, Grant Hospital, Columbus, OH; E. Prado, RN, McAllen Hospital, McAllen, TX; P. Kirk, MD, Emanuel Hospital, Portland OR; N. Golden, RN, Sierra Medical Center, El Paso, TX; J. Furman, MD, R.E. Thomason General Hospital, El Paso, TX; L. Del Castillo, RN, Brownsville Hospital, Brownsville, TX; R. Hatcher, MD, Grady Memorial Hospital, Atlanta, GA.

Finally, we thank Barbara L. Lindheim, MA, T. James Trussell, PhD, and Howard W. Ory, MD, MSc, for their constructive input to the data analysis phase of the project.

Special Communication

The Hyde Amendment in Action

How Did the Restriction of Federal Funds for Abortion Affect Low-Income Women?

Willard Cates, Jr, MD, MPH

• In August 1977 the Hyde Amendment, which restricts the use of federal funds for abortion, was implemented; it remained in operation during the next 2½ years. During this interval, the Hyde Amendment was effective in nearly eliminating federally financed abortions. However, an estimated 94% of pregnant, low-income women "at risk" obtained a legal abortion, 65% with state funds and 29% with other sources of funding. About 5% of low-income women continued their pregnancies to term, while only an estimated 1% resorted to illegal abortion. These results are contrary to the predictions of both "pro-life" and "pro-choice" advocacy groups.

(*JAMA* 1981;246:1109-1112)

THE HYDE Amendment to the Labor-Health Education and Welfare appropriations bill restricts the expenditure of federal funds for abortion services.[1] It was first passed by Congress in 1976, and, after judicial review, was implemented on Aug 1, 1977 (Table). During the next 2½ years, political debate focused on those limited situations for which federal funding for abortion would be allowed: (1) when the life of the woman was in danger if the pregnancy were continued; (2) when pregnancy resulted from rape or incest; and (3) when "severe and long-lasting physical health damage" would result if the pregnancy were continued to term.

On Feb 19, 1980, all limitations on federal funding for abortion were again lifted because of judicial decisions, and this unrestricted federal funding policy for abortions was in effect until Sept 19, 1980, when court rulings again permitted implementation of the Hyde Amendment.[1] Thus, currently, no federal funding of legal abortion is allowed except to save the life of the pregnant woman.

The Hyde Amendment primarily affects the Medicaid program (Title XIX of the Social Security Act), which uses combined federal and state funds to pay the costs of medical care for indigent populations. The particular group directly affected by this policy is low-income pregnant women. In the remainder of this article, the health impact of the Hyde Amendment while it was in effect during the 2½-year interval between August 1977 and February 1980 is summarized.

Population at Risk

In fiscal year 1977, the year before the Hyde Amendment, approximately one fourth of the 1.3 million abortions in the United States were obtained by low-income women.[2] These abortions were financed by a combination of state and federal Medicaid funds at a total estimated cost of $87 million. Thus, approximately 295,000 low-income women actually obtained publicly funded abortions (Figure). Assuming no increase in the number of abortions desired by low-income women, this number represents the minimum estimate of the women that were affected by the Hyde Amendment. Another 132,000 Medicaid-eligible women were estimated to be in need of abortion services before the Hyde Amendment,[2] but these were not included in the population at risk.

Implementation of Hyde Amendment, United States, 1976 to 1980

Date	Action	Effect	Interval
October 1976	Hyde Amendment passed by Congress, but enjoined by courts	Federal funding of abortion continued	10 mo
August 1977	Injunction lifted after Supreme Court ruling	Federal funding restricted except to save life of woman	6 mo
February 1978	Guidelines expanded by Congress	Federal funding expanded to include situations of rape, incest, and physical damage to women	2 yr
February 1980	Hyde Amendment again enjoined by Supreme Court	Federal funding of abortions resumed	7 mo
September 1980	Injunction again lifted after Supreme Court ruling	Federal funding restricted	Ongoing

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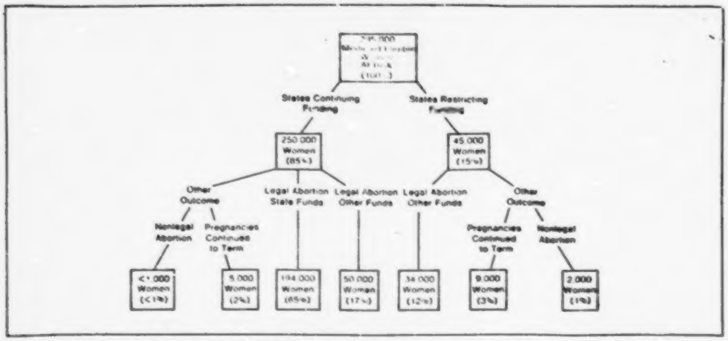

Estimated effect of restricting federal funds for abortion for Medicaid-eligible women "at risk," by state funding status (estimates based on fiscal year 1977 and 1978 survey of states and monthly monitoring of state funding status, Alan Guttmacher Institute) and projected outcome of pregnancy (estimates based on studies in restricted states and on national surveillance of abortion morbidity and mortality, Centers for Disease Control, Atlanta).

Federally Financed Abortions

The Hyde Amendment was effective in reducing the number of federally financed abortions. In fiscal year 1978, the first year of implementation, an estimated 2,100 abortions qualified under the limited conditions for federal matching funds.' During the second year of the Hyde Amendment, approximately 4,000 abortions were performed for which federal reimbursement was claimed.' Given the levels of previous funding, about 600,000 federally financed abortions would have been expected during these two years; instead, only 6,000 qualified for federal reimbursement. Thus, the restrictive legislation sharply lowered the number of federally financed abortions for Medicaid-eligible women to about 1% of the prerestriction level.

Of those 6,000 abortions financed by federal funds, 82% were for life-endangering situations, 16% for long-lasting physical health damage, and only 2% for rape or incest.' Some "pro-life" groups had argued that expanding the federal funding coverage to include the situations of long-lasting physical damage and rape or incest would lead to widespread abuse by women making fraudulent claims. However, during the interval in which the expanded guidelines were in operation, no evidence was produced that federal funds were being used fraudulently by either Medicaid-eligible women or abortion providers to obtain abortion funding.

State Abortion-Funding Practices

Even though the Hyde Amendment was effective in decreasing the number of federally financed abortions, it was not binding in regard to how states chose to spend their own funds. During the first year the Hyde Amendment was in effect, 16 states and the District of Columbia continued to provide state funds to finance abortions under most circumstances.' During the next 1½ years, an additional three states were required by judicial decisions to resume financing abortions with state funds for low-income women. Among the states with relatively liberal funding standards were some of those with the largest populations of women who had obtained abortions supported previously by federal matching funds, including California, New York, Illinois, Michigan, and Pennsylvania.' Thus, during the 2½ years of the Hyde Amendment, an estimated 85% (250,000) of the women who got Medicaid abortions before the cutoff resided in states that were providing state funds for abortion, albeit not using federal funds (Figure).

Health Effects of the Hyde Amendment

The low-income woman faced with an unwanted pregnancy had four options': (1) she could seek and qualify for a publicly funded abortion under the allowable circumstances; (2) she could use private funds to obtain a legally induced abortion; (3) she could use private funds to obtain a nonlegal abortion; or (4) she could carry the pregnancy to term. The distribution of these options depended, in part, on whether the woman lived in a state that continued (funded state) or restricted (restricted state) state funding.

States That Continued Funding

Although Medicaid-eligible women with unwanted pregnancies living in states that continued to finance abortions with state funds theoretically could obtain abortions at the same level as before the Hyde Amendment, such was apparently not the case (Figure). Of the 250,000 low-income women who would be expected to use state funds to obtain abortions, only 194,000 (78%) were estimated to have done so.'

However, trends in funding practices were not uniform among the states that continued to finance Medicaid abortions. Some states funded abortions at about the same level as before the Hyde Amendment, while others had much lower proportions of state-funded abortions. The latter situation occurred primarily in those states where interpretation of abortion funding policies varied as a result of different legislative, judicial, or executive decisions. For example, the abortion funding policy in Illinois changed four times during fiscal year 1978 as a result of changes in state law and two different court rulings. As a result, Illinois financed fewer than one fourth the number of Medicaid-funded abortions than it had in the year before the Hyde Amendment. The widespread publicity about the restriction of federal funds may have obscured the recognition of the continuing availability of state funds for abortion. This confusion may have deterred some low-income women from requesting abortions and some abortion providers from soliciting state reimbursement.

Of the remaining options available to pregnant, low-income women living in funded states, most women apparently used financing mechanisms other than Medicaid to terminate their pregnancies. Sources of these other funds apparently included personal finances, reduced provider fees, county hospital services, and philanthropic contributions. In Illinois, 20% of women used private funds to finance legal abortions. Extrapolating from these data, an estimated 50,000 women in funded states used sources other than Medicaid to obtain legal abortions (Figure).

Extrapolating from birth data in Illinois, a small percentage of women unable to obtain publicly financed abortions in funded states apparently carried their pregnancies to term; they accounted for an estimated 5,000 deliveries (Figure). The same confusion over the availability of state funds for abortion that led some women to use other means to finance their pregnancy terminations may have led other women to continue their pregnancies to term.

Finally, based on an indirect measure of morbidity and mortality, an even smaller percentage of women in funded states resorted to the least safe option, illegal abortion. Apparently some women choose to use clandestine channels to terminate unplanned pregnancies even when publicly funded, legal abortion is widely available. Whether they did so for reasons of ignorance, privacy, or preference is unknown. Therefore, nationally, an estimated 98% of Medicaid-eligible women living in funded states obtained legal abortion although one fourth of these used nonstate funds to finance the procedure (Figure).

States That Restricted Funding

Although Medicaid funds for abortion were not available to the estimated 45,000 Medicaid-eligible women living in states with restrictive policies (Figure), this did not deter the majority of low-income women from obtaining legal abortions. Though a smaller percentage of women in restricted states than in funded states obtained abortions, most were apparently able to use other sources of funding to terminate their pregnancies. Studies in Texas, Ohio, and Georgia indicate that between 65% and 80% of Medicaid-eligible women in these states subsidized their abortions from combinations of personal funds, reduced provider fees, county hospital services, and philanthropic contributions; these women represent about 12% of the Medicaid-eligible population at risk (Figure). Thus, even in restricted states, financial options existed that aided low-income women in obtaining legal abortions.

Low-income women in restricted states did not appear to resort in large numbers to illegal abortion. Because of its surreptitious nature, no direct measurements of illegal abortion were available; thus, such indirect parameters as morbidity and mortality must be used to estimate the occurrence of illegal abortion. Data from our national monitoring system could not document that the restriction of federal or state funds for abortion caused any more than 5% of pregnant, Medicaid-eligible women in restricted states to choose self-induced or non-physician-induced abortions. The actual percentage was probably lower. This inference was supported by our more thorough follow-up study of all hospitals in three specific metropolitan areas in restricted states.

However, when illegal abortions are obtained, the risks of complications and deaths are greater. Through our abortion mortality surveillance system, we have identified one death that was directly attributable to the restriction of federal funds, and three deaths that were indirectly attributable to it. Moreover, in one restricted state, an apparent cluster of abortion complications occurred among Medicaid-eligible women after public funds for abortion were discontinued. Based on these indirect measures, an estimated 2,000 women in restricted states resorted to illegal abortion in the year after the Hyde Amendment (Figure).

Regarding term births, evidence from Texas, Georgia, and Ohio indicated that an estimated 18% to 35% of Medicaid-eligible women in these restricted states continued unwanted pregnancies to term; if state funds were available these women apparently would have terminated their pregnancies by obtaining legal abortions. The percentage of women who carried their pregnancies to term appears to differ among restricted states. For example, in 1978 in Texas, an estimated 35% to 40% of the expected number of legal abortions were not obtained by Medicaid women, the fertility rate for women eligible for Medicaid increased 1% between 1976 and 1977 and 12% between 1977 and 1978, indicating that some Medicaid-eligible women were continuing pregnancies to term. However, using a similar analytic approach in Georgia, an estimated 18% of the expected number of legal abortions were not obtained by Medicaid women, and little difference existed in the fertility rate between Medicaid- and non-Medicaid-eligible women. Based on these studies, an estimated residual 9,000 women in restricted states carried their pregnancies to term (Figure).

Those low-income women continuing their pregnancies to term as a result of the Hyde Amendment are probably those who delay their decision about abortion until the second trimester—primarily young teenagers. Because these later abortion procedures are generally more costly and less available than those performed in the first trimester, low-income women would have greater difficulty finding and financing them. Our observation in nonfunded states that a lower percentage of nulliparous, unmarried teenagers had legal abortion complications, and therefore legal abortions, after the funding restriction[17] is consistent with the hypothesis that the Hyde Amendment primarily deters second trimester abortions.

Conclusions

How, then, did the Hyde Amendment affect low-income women? Taken together, the data indicate that, while it was effective in nearly eliminating federally financed abortions and in shifting the payment source for about one third of abortions from the public to the private sector, the Hyde Amendment had only a minor impact on Medicaid-eligible women who wanted to terminate their pregnancies. An estimated 94% of low-income women obtained a legal abortion, 65% with state funds, and 29% with other funds. About 5% of Medicaid-eligible women continued their pregnancies to term, while only an estimated 1% resorted to illegal abortion. These observations do not support the predictions of either the "pro-life" groups who hoped abortions to low-income women would be eradicated or "pro-choice" groups who feared complications from illegal abortion to low-income women would be widespread.

Carl W. Tyler, Jr, MD, Nancy Binkin, MD, MPH, and Rachel B. Gold gave advice and made important contributions to this article.

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JAMA
75 YEARS AGO

Sept 1, 1906

Some Truths About Sleep

[Original Article, p 652]

In the popular mind there must be some mistakes about sleep, so variant and dissimilar are the views as to the need of sleep, the effects of it, and of the lack of it.

One man is sure that for health and strength he needs only four or five hours of sleep out of each day of twenty-four hours, and he quotes numerous people above childhood who have like views and experiences. Another must have eight or nine hours and cannot do with less, and, as all men tend to measure others by the yardstick that fits themselves, he is sure to believe that no one should have less than one-third of his existence spent in sleep.

The medical profession freely teaches this latter view and insists that children especially must have an abundance of sleep or be in peril of nervous and mental bankruptcy. We are told that infants should sleep a large part of the time for safety from calamity to their brains, yet there are instances of infants and small children who have for many months together slept less than four hours in the twenty-four and come out of the experience with vigorous minds and bodies.

Insomnia: A Wrong Theory

Great numbers of people in our modern life of high nervous tension are victims of insomnia, more now than ever before, and the number is apparently increasing rather rapidly in certain communities. Drugs to produce sleep were never in such demand, were never used so freely, both as a temporary expedient and as a daily habit, as now, and they are sold in vast quantities all over the nervous world, and used according to the whim of the sleepless, more often without than with the advice of physicians. Insomnia is therefore a favorite harvest field of the exploiter of "patent" nostrums, for he well knows that, driven to desperation by sleeplessness, its victim is ready to do anything that promises relief; and if sleep comes as an effect of a drug he is ready to forgive other and perhaps resulting ills, that may in the end be worse than the insomnia.

Possibly some of the sleeping potions may do good by helping to sleep without inflicting any incidental harm to the system, but the evidence is strong and accumulating that most, if not all, of the soporific drugs do harm in some way, especially the coal-tar products and all those that work their effects by obtunding the sensibilities of the nervous system. While their use may be justified by an occasional exigency, they are in the main mischievous because, if for no other reason, they undertake a function and do a thing for the body that good hygiene and a better course of living, as a rule, should make unnecessary.

Senator HATCH. The next witness to appear before the committee will be Ms. Elaine Jones. Ms. Jones will be representing the NAACP Legal Defense Fund. So we will be happy to have you, Ms. Jones, appear before the committee at this time—if she is here.

Mr. TAYLOR. Mr. Chairman, I am substituting for Ms. Jones.

Senator HATCH. We will be happy to have another member of the Leadership Conference on Civil Rights, Bill Taylor, substitute for Ms. Jones.

I am sorry, we thought she would be here.

We are happy to welcome you once again to the committee, Mr. Taylor. You are certainly one of the strongest spokesmen for your point of view in the country.

STATEMENT OF WILLIAM L. TAYLOR, DIRECTOR, CENTER FOR NATIONAL POLICY REVIEW

Mr. TAYLOR. Thank you very much, Mr. Chairman.

For the record, my name is William L. Taylor. I am director of the Center for National Policy Review, a civil rights research and advocacy organization.

I regret, Mr. Chairman, that I do not have a prepared written statement to submit to the committee. I was not contacted until late Friday to participate in the hearing today.

I do have a brief, about a 10-minute oral statement, and would be certainly glad to answer any questions you may have.

I appreciate the opportunity to testify here this morning on S. 522.

As you know, Mr. Chairman, there have been lots of discussions over the last few years about whether the appropriate standard for determining a violation of the civil rights law, should be intent or effect.

I would have to say that by the use of either of these standards, one must conclude that S. 522 is a bill calculated to do grievous harm to title VI of the Civil Rights Act of 1964, the statute that black people, Hispanic people, Indians, and other minorities have relied on for more than 20 years to redress discrimination that they have suffered and that has been subsidized by the use of Federal funds.

Now let us examine the bill for a moment.

The first clause of this new section of title VI, section 606, would read as follows:

> Nothing contained in the Civil Rights Act of 1964 shall be construed to authorize the use of Federal financial assistance for abortions . . .

That clause, if I may say so, is nonsense. It is gibberish. With the possible exception of title IV of the Civil Rights Act of 1964, which provides technical assistance to school desegregation, nothing contained in the Civil Rights Act of 1964 authorizes Federal financial assistance to any nonfederal entity for any purpose whatsoever.

Title VI of the Civil Rights Act of 1964 is not an authorization of funds. It is a prohibition on the use of funds in a racially discriminatory way that are authorized under other statutes.

So it simply is not possible for anything contained in the Civil Rights Act of 1964 to be—and I am quoting—"construed to authorize the use of Federal financial assistance for abortion" or for anything else for that matter.

If this first clause does nothing but guard against a danger that is patently nonexistent, why is it in the bill to begin with? It is there to provide a manufactured link where no real link exists between the noble purposes of title VI and the scheme that is involved in S. 522.

That scheme is revealed by the second clause of S. 522, and I am quoting:

> And no such assistance shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

The reach of this second clause is subject to interpretation. It is possible to argue, as I gather you do, Mr. Chairman, that the prohibition extends only to Federal assistance extended to the units of hospitals and health facilities where abortions could be performed; that is, obstetrical and gynecological units. In that case hospitals and other health facilities that have received funding would not be prohibited from performing abortions as long as the obstetrical and gynecological unit receives no funding. Such an interpretation would have some support from the Supreme Court's interpretation of the term "program or activity" in *Grove City* v. *Bell*. But in the pre-Grove City law and administrative interpretation, and under the provisions of S. 431, the Civil Rights Restoration Act of 1985 now pending in this body, this clause of S. 522 would have a far broader reach. It would in fact prohibit the performance of an abortion in any hospital or health facility which received Federal funds in any of its operations, whether or not such funds were directly received by the obstetrical and gynecological unit.

So, for example, if Federal dollars had been used in the past under the Hill-Burton Act or other laws to build or renovate a hospital or outpatient clinic, the hospital or clinic would be barred from carrying out an abortion, except under the limited provisions of the Act.

Under this interpretation, S. 522 would operate as a nationwide ban on hospital-based abortion. So the message of the author of S. 522 to civil rights advocates is clear: if you wish to restore title VI to the broad scope that it had before *Grove City*, then you must accept a nationwide ban on hospital-based abortions. If you are ready to accept a more narrow interpretation of title VI, then the restrictions on abortions would be less sweeping.

The question may be asked, what is wrong with this approach? Does it not come under the heading of what is sauce for the goose is sauce for the gander? The answer to that question, I submit, is a simple one: what is wrong with it is the Constitution of the United States.

In broadly prohibiting the use of Federal funds to subsidize discrimination based on race, color, or national origin, Congress acted in 1964 and proposes to act again this year in furtherance of the constitutional right to equal protection of the laws guaranteed by the 5th and 14th amendments. That Congress is authorized to do under section 5 of the 14th amendment.

In making health facilities that receive Federal funds unavailable for the performance of abortion, S. 522 would be an action of derogation of rights guaranteed by the Constitution as declared in *Roe* v. *Wade*. That is beyond the authority of the Congress and I would mention simply *Morgan* v. *Katzenbach* as a case which establishes that proposition fairly clearly.

I do not appear here today to state any policy view on the issue of abortion, but I do come as a believer in the preservation of the Constitution and maintaining the integrity of the legislative process. From that standpoint, Mr. Chairman, S. 522 is atrocious legislation.

I should just like to add a few more points about the legislative process before I conclude my statement.

In introducing S. 522, you said that your purpose was to make permanent the appropriation rider sponsored by Representative Hyde. To the extent that S. 522 goes beyond a limitation on the use of specific Federal funds for abortion and is designed to accomplish a general prohibition of abortion, the bill is clearly unconstitutional.

If that is the aim, the appropriate vehicle for accomplishing it is a constitutional amendment.

If instead the aim is more limited, to condition the use of specific Federal funds, there are several appropriate ways to proceed, either through amending one or more of the appropriate authorizing statutes or through a free-standing bill.

There is no legitimate reason in my judgment for seeking to amend title VI, a statute whose purposes, as I have shown, are wholly unrelated to S. 522.

In conclusion, I would suggest to the committee that all of us, whether we are for or against broad coverage and strong enforcement of the civil rights laws, whether we are for or against Government prohibition of abortion, are ill served by S. 522. It is this kind of legislative trickery that brings Congress into disrepute in the eyes of the American people and discourages informed participation in the political process.

Let us by all means have a congressional debate on appropriate legislative policy on abortion, but let it be a reasoned debate on the merits of that issue. And let us move forward with the Civil Rights Restoration Act of 1985, which has been bottled up in committees since its introduction several months ago. Let us debate too on the merits of what is needed to prevent Federal subsidy to discrimination, and let us be unencumbered by the tactics manifested in S. 522 or by the thousands of other irrelevant amendments that the chairman offered last year.

That I submit is not too much to ask and it is what the American people deserve from their elected representatives.

Thank you for the opportunity to testify.

Senator HATCH. Mr. Taylor, your testimony is quite similar to the testimony delivered by the NAACP witness who testified last hearing.

Mr. TAYLOR. I can assure you it is my own testimony.

Senator HATCH. You, like the NAACP, contend that S. 522 opens the door to making title VI the vehicle for a variety of other important issues. Is that is basically the case that you make?

Mr. TAYLOR. That is part of my case, yes, sir.

Senator **Hatch**. What then is your position on S. 1432, which was mentioned earlier? This is a bill introduced by Senators Kerry, Kennedy, and others which would amend title VI and other civil rights statutes to include protection for affectational preferences or sexual preferences.

Mr. **Taylor**. I have not taken a position, Senator, on S. 1432.

As you know, what Congress has done——

Senator **Hatch**. What would be your position if you were taking a position?

Mr. **Taylor**. I do not know since I have not taken one yet.

Let me say this, as you know, Senator, since 1964 when the Congress has considered and sought to prohibit discrimination based on grounds other than race, color or national origin, what it has done is to enact counterpart statutes to title VI. It has enacted title IX, which was part of the educational amendments of 1972, it enacted section 504, which was part of the Vocational Rehabilitation Act. It has enacted the Age Discrimination Act.

It did not accomplish any of those goals by seeking to amend title VI.

Senator **Hatch**. What about the Pregnancy Disability Act back in 1978, an amendment to title VII?

Mr. **Taylor**. That was an amendment to title VII growing out of a Supreme Court construction of the meaning of title VII.

Senator **Hatch**. Sure, I participated in it.

Mr. **Taylor**. And it was obviously—beg your pardon?

Senator **Hatch**. It is hard to understand why it is totally improper to add an amendment to protect the unborn while supporting a gay rights amendment. It seems to me that if you are against the unborn being written into a special section of title VI, you ought to be against any other type of amendment as well, including the gay rights amendment.

Mr. **Taylor**. If that bill comes up before this committee, I would be here to testify on it.

My general belief is that the distinctions that are based on irrational and arbitrary grounds ought to be prohibited and that Federal subsidies ought not to go to institutions that make those distinctions.

So that, yes, I would tend to think that the Congress should very seriously consider that bill, but it is not being offered or should not be offered as an amendment to title VI, just as S. 522 ought not to be offered as an amendment to title VI.

Senator **Hatch**. The gay rights bill not only amends title VI, but other civil rights statutes. What bothers me about some of the civil rights community is that it seems to be selective as to whose civil rights it is protecting. Gay rights might be justified, but a perminent Hyde amendment is not.

You seem to talk in terms of this amendment as being frivolous when in fact the Congress of the United States for the last 8 years has put the Hyde amendment on most appropriations bill.

Mr. **Taylor**. I did not take a position, Senator, on the Hyde amendment. I did not come here to take a position on the Hyde amendment.

The thrust of my comment is that S. 522 in its present form is a subversion of the legislative process. It is intended to hold one set of rights hostage to another presumed set of rights.

If this bill were to be introduced as an amendment to an authorizing bill, if it were to be introduced as a constitutional amendment, if it could be introduced as a free-standing statute, then we could sit here and debate it on its merits, rather than for what it is, which is as I say holding one set of presumed rights hostage to another set of rights.

Senator HATCH. It seems to me you are concerned about the first clause of this bill which states "Nothing contained in the Civil Rights Act of 1964 shall be construed to authorize the use of Federal financial assistance for abortions." This language was meant solely to conform this amendment to other amendments of the 1964 act and to restate the established principle that the 1964 act does not authorize abortion funding.

You said that yourself as I recall your testimony.

If this provision were dropped from the bill, would the remaining language do anything more than just make the Hyde amendment permanent?

Mr. TAYLOR. If this provision were dropped from the bill, it would reveal with stark clarity that this amendment has nothing to do whatsoever with title VI.

The remaining language obviously would not be acceptable.

If the remaining language were introduced as a freestanding bill, Senator, then one could have that discussion and debate.

Senator HATCH. The remaining language says "no such assistance shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." How could that be discriminatory?

Mr. TAYLOR. The "such" refers to something, and the referral is back to the first clause of the bill.

I would be glad to go through the Civil Rights Act of 1964 with you, Senator, and look for any language that authorizes any expenditure of Federal financial assistance.

Senator HATCH. This is limited to Federal financial assistance. I do not see how you can construe that to overturn *Roe* v. *Wade*.

It would be better to say you are against antiabortion approaches. I could understand that. That is a legitimate argument by some people on the other side of this issue.

Mr. TAYLOR. Senator, with due respect, I will make my own statements as to what I am for and what I am against.

Senator HATCH. All right.

Mr. TAYLOR. What I am suggesting to you is that *Roe* v. *Wade* declared certain constitutional rights and an amendment to the law which says that the facilities that are needed to give effect to those rights will not be available is in derogation to those constitutional rights, and the appropriate way to deal with that is through a constitutional amendment.

Senator HATCH. This bill does not affect programs or activities. It just says no financial assistance will be available to perform abortions. We will not sock the taxpayers to abort 2 million babies a year. That is what it says there.

Mr. Taylor. Well, I would construe this bill—and we are moving off the subject of the appropriateness of this legislation—I would construe this bill to bar the performance of abortion except where the mother's life is in danger at a hospital that is constructed or renovated with Hill-Burton funds or with other funds that are provided——

Senator Hatch. How can you do that with this language? Tell me where you find it? This only limits specific financial assistance. How can you find that in this language?

Mr. Taylor. That was the interpretation of title VI prior to *Grove City*.

I think, frankly, that that particular interpretation may even survive the *Grove City* decision.

Senator Hatch. I can see how your argument that the Supreme Court has not recognized any rights for the unborn would be applicable if S. 522 denied Federal aid to a hospital performing abortions. In that instance the bill would be denying aid to an institution only because it allowed the constitutional activity. But this bill does not do that. It places no limits on recipients or programs. It merely says that Federal dollars may not be used to perform abortions. And as I have noted in my opening statement, three separate courts recognize that distinction; namely, Congress may restrict Federal financial assistance itself without restricting recipients' activities with other sources of assistance.

Since this bill by its very terms only restricts Federal financial assistance itself—not the recipient of Federal financial assistance—would you agree that this bill does not affect the substance of *Roe* v. *Wade* at all and it does not extend beyond the limits defined?

Mr. Taylor. What I am saying, Senator Hatch, is that the reach of this bill is a factual inquiry, and as I read the bill, it would go far beyond the statement you are making now about it and would deal with private hospitals, private clinics, that are supported in some way by Federal financial assistance.

If that reading is correct, you may say it is not correct, then certainly it would be in derogation of the rights that were declared by *Roe* v. *Wade* and would not be covered by the *Harris* v. *McRae* decision.

Senator Hatch. I say that is not correct. You show me what language in the bill sustains your position. Just show me what language.

Mr. Taylor. As I have already indicated, I think the bill is a very strange and peculiar one to begin with, because it starts with a statement that "Nothing * * * shall be construed to authorize the use of Federal financial assistance"—nothing in the act.

Well, if you have a reference point, if you could look at what in the act authorizes the use of Federal financial assistance, that might help you in your inquiry.

And then it goes on to say, "and no such assistance"—well, I suggest to you, just staying with the Hill-Burton example, that it could well be construed that this kind of bill, if it were enacted into law, would prohibit a hospital with Hill-Burton funds from conducting an abortion.

Are you saying that I am wrong?

Senator HATCH. You are saying Hill-Burton funds are being used to perform abortions?

Mr. TAYLOR. Hill-Burton funds have provided the four walls of facilities in which abortions are performed. In that sense Hill-Burton funds are being used to perform abortions under the current law.

Senator HATCH. Hill-Burton funds are not and may not be used to perform abortions. As I stated previously, the Pregnancy Disability Act and Civil Rights Act state an employer may not be required to provide "health insurance benefits for abortions." Yet regulations under title IX require educational institutions receiving Federal aid to provide abortions under insurance programs.

In your mind there is an inconsistency under the Civil Rights Act concerning abortions?

Mr. TAYLOR. Title IX is a prohibition on discrimination based upon sex in the use of Federal funds.

The Department of Education, then the Department of Health, Education and Welfare, determined I think in 1975 through its regulations that discrimination or distinctions made on the basis of pregnancy or termination of pregnancy were discrimination on the basis of sex.

Those regulations stand on the books today. Neither this administration nor any other administration has seen fit to repeal them, and so I gather that there is a broad interpretation that such distinctions which apply and place restrictions amount to discrimination.

Senator HATCH. Thank you very much, Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman.

Senator HATCH. The subcommittee would like to next call Mr. James Bopp, who is with the firm of Brames, Bopp, Haynes & Abel, who participated in the *Williams* v. *Zbaraz* case before the Supreme Court, which established that a State may restrict abortion funding.

Recently he edited a book "Restoring Right to Life," University Press, published back in 1983.

We are very happy to welcome you before the committee, Mr. Bopp. We will be glad to take your testimony at this time.

STATEMENT OF JAMES BOPP, JR., ESQ., BRAMES, BOPP, HAYNES & ABEL

Mr. BOPP. Thank you very much, Mr. Chairman, for inviting me to testify here today concerning the legal effects and ramifications of S. 522, of which you are the sponsor and which is under consideration by this subcommittee.

Since 1976, a substantial portion of my practice as an attorney has been devoted to examining and litigating important legal issues involved in ensuring full legal protection for all innocent human beings from conception to natural death. In that connection I have served as general counsel for National Right to Life Committee since 1978 and have chaired its committees on Human Life Amendment and Legislative Policy.

In addition, I have chaired three professional conferences at major universities, examining the legal and medical issues involved with full legal protection for all human beings, focused primarily on the unborn, the newborn, and the elderly who are disabled by age or health conditions.

For the information of the committee, I have attached a copy of my resume to my formal written testimony and am testifying here today in my individual capacity.

Mr. Chairman, it is a particular pleasure to appear before you as I am familiar with your strong commitment to protect all human beings regardless of their age, function or condition of dependency, and you have been a leader in Congress in extending full civil rights to all of our citizens which are currently in various stages of jeopardy.

In this case, S. 522 involves a more limited effort than restoring any constitutional or substantive legal protections for the unborn, but involves limiting the use of Federal funds for abortion.

The effect of S. 522 would be to effectuate a current congressional policy to limit Federal funding for abortion only to those circumstances in which the life of the mother is endangered.

This would be a true permanent Hyde amendment, which is unambiguous in both its intent and effect.

I have been very troubled sitting here today, Mr. Chairman, hearing the fanciful charges and gross misrepresentations that have been made about this bill. It seems that those who oppose this bill seek to focus, not upon the intent and purpose of S. 522, but to raise other issues which they feel might strengthen their opposition to the bill by I believe misrepresenting its intent and purpose.

Senator HATCH. It does bother me just a little bit. Both you and Ms. James brought out that these very people argued against protecting the rights of the unborn, yet for the most part they would be for the gay rights bill being attached to the Civil Rights Act of 1964. It seems to me they should then be for legislating some rights for the unborn.

It smacks too much of ideology rather than what is right here. That is where I have some difficulty with the other side on this issue among other things.

It is all right to take care of homosexuals in the Civil Rights Act of 1964, but not the unborn. That just seems pretty illogical to me. I do not understand that.

Mr. BOPP. Mr. Chairman, National Right to Life Committee takes no position on the question of the rights of homosexuals. However, we would note that S. 1232, as published in the Congressional Record on July 15, 1985, in its section 4, provides as follows:

> Section 601 of the Civil Rights Act of 1964 is amended by inserting after "color" the following: "affectional or sexual orientation."

Senator HATCH. That is right, they are willing to amend 601 for that, but they are not willing to add a section 606 to prevent abortion funding.

This does not amend 601; this establishes a new section, 606, that literally refuses to spend Federal funds on abortion.

To me it is pretty illogical.

I am sorry to interrupt you, but I have to make that statement.

Mr. BOPP. Thank you, Mr. Chairman.

I think that the fundamental trickery—a phrase that I heard this morning—or "subversion of the legislative process" is taking place by those who either do not have the time or are unwilling to read S. 522 to determine what its intent and effect are.

As the chairman was just pointing out, the fundamental thing about S. 522 is that it adds a new section to what is in the United States Code as subchapter 5 of title 42. It adds a new section which provides for the restriction on the use of Federal funds for abortion.

Now, the racial discrimination section which prohibits discrimination on the basis of race is found in section 601—not in section 606, which would be added by your bill. It is that prohibition which is much broader than the coverage of the new section 606 added by your bill which these witnesses keep talking about. They are sitting here testifying as if your bill amended section 601.

All they have to do is read it to determine that it would not do so.

It adds a new section, 606, which provides its own and specific limitation on the use of Federal funds.

Senator **Hatch**. In fact, it starts out by saying "Section 606," which makes it a new section.

Mr. **Bopp**. Mr. Chairman, a bill could be drafted which has as broad a reach as what the opponents of your bill are claiming. Your bill could, for instance, read as follows:

> No person shall perform or pay for the performance of any abortion under any program or activity receiving Federal financial assistance except where the life of the mother would be endangered if the fetus were carried to term.

Now, your bill could say that; it does not say that.

If it did say that, it would in fact reach as far as the opponents of this bill have claimed; that is, it would reach so far as to prohibit hospitals who received Federal financial assistance from using their own private funds for abortion.

However, all you have to do is read the wording of your bill to find that such phrases are not used.

In your bill you do not prohibit discrimination against the unborn in any respect, nor does your bill impose any condition on a recipient;indeed it does not even use the word "recipient." In addition, it does not impose any condition on any program or activity—it does not even use the phrase "program or activity." It says simply that "no Federal financial assistance shall be used to perform abortions."

So it is a restriction focused only on the use of Federal financial assistance.

There are programs in which there are currently existing statutory provisions in these words and phrases. Specifically I refer to the parts of the statutory law on family planning funds that prohibit the use of family planning funds to pay for the performance of abortions.

Now, the affect of that statutory language does not prohibit family planning agencies that "receive" Federal financial assistance from performing abortions. It simply means that they must segregate their funds.

They have Federal funds here in one pot, then they have private or State or local funds here, or fees for services over here in another pot.

In the first pot, the Federal financial assistance, they cannot pay for abortions. In these other pots—State funds, local funds, private funds, fees for services—they may. And that is exactly the way the family planning assistance works. Indeed, Planned Parenthood, that receives tens of millions of dollars in Federal financial assistance performs 85,000 abortions a year at their facilities, and they do that by segregating their funds. They say they do not use their Federal funds to pay for abortions, but they use all of these other funds to do so.

That is precisely the effect that the enactment of S. 522 would have, that it would not reach private, State or local governmental funds or fees for services that can be available for a hospital or an agency that wants to perform abortions with those funds can use them to perform abortions with those funds.

Thus all you have to do is examine the basic wording and placement of your bill to find that it is a much more limited act than the restriction on racial discrimination found in section 601, and that only conditions the use of Federal financial assistance for those purposes.

The adoption of S. 522 would enact an important congressional policy that is currently found in a variety of Statutes, and also found in appropriation riders and regulations adopted by various governmental agencies. There is currently existing statutory law restricting the use of Federal funds for abortion for the Department of Defense, which goes into effect October 1 of this year, for two family planning programs and finally the adolescent family life program, and I cited the statute for each of those prohibitions on abortion funding in my written testimony.

In addition, there have been appropriation riders enacted annually for at least the last 5 years, and in some instances the last 10 years, which have restricted the use of Federal funds for any program administered by the Department of Health and Human Services, for the Federal employee benefit program, for the District of Columbia appropriations bill, and finally the Peace Corps.

There are, as far as we know, no current Federal program that pays for the performance of abortions with Federal funds. We have then established a clear forthright congressional policy on this matter.

Now, the intent of title S. 522, that I have determined from reading the statute, and from examining the nature of the restrictions imposed by subchapter 5 of title 42, which this act would amend by adding a new section, is to first incorporate into statutory law the limitation on abortion funding that is currently existing in a variety of places in Federal law.

Second, it would apply that restriction uniformly to all Federal funds.

And finally, it would remove the issue of whether or not abortions are to be funded from the annual appropriations debate.

It would add a new section 606 of title VI of the Civil Rights Act of 1964 and would utilize therefore the enforcement mechanism that exists under title VI, which is that title VI reaches all Federal funds and requires anyone receiving Federal funds to comply with that policy in the first hand, and second to provide assurances through a contract that they will comply with such a policy.

And finally, if the policy is violated by the person who receives Federal financial assistance, then there is an enforcement mechanism available through the regulations promulgated under title VI which are geared toward ensuring that the recipient comes back into compliance.

If you examine the legislative debate and the other legislative history behind the Civil Rights Act of 1964, specifically title VI of that act, you will find that these were the purposes of the enactment of that law.

First was to guarantee that funds of the United States are not used to support racial discrimination. As I have already pointed out, the purpose behind this statute is somewhat different and more limited, and that is to restrict only the use of Federal financial assistance for the performance of lifesaving abortion.

Second, the purpose of title VI is to effectuate a uniform policy in a Federal assistance program.

Third, it was to ensure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.

And finally, it was enacted to avoid the reoccurrence of acrimonious debate in Congress when discussing individual Federal aid programs.

Title VI was then enforced by requiring Federal agencies to obtain an assurance from anyone receiving Federal financial assistance, that they will comply with Federal policy.

And as a practical matter, that means that there is a condition that is contained in the contract, that is signed by the recipient who receives Federal financial assistance and the Federal agency, to provide an assurance that they will comply with this policy.

Now, I have set forth in more detail in my written statement the specific citations and legislative history for all of these matters; that is, the purposes for the enactment of title VI of the Civil Rights Act of 1964, the purposes that the authors intended for it; and second, the enforcement mechanism under which a recipient of Federal funds can then be brought into compliance if they fail to comply with the assurance found in the contract which they signed which contains the Federal policy.

The purposes of S. 522 are perfectly consistent with each of these four purposes of title VI of the Civil Rights Act of 1964. The only thing that is different between S. 522 and section 601 of the original title VI is the declaration of policy and the limitation on use of funds.

As I pointed out before, section 601 is much more expansive in prohibiting racial discrimination.

If you receive $10,000 in Federal financial assistance in any program or activity and you have additional funds, let's say the total funds for the program or activity is $100,000, the current section 601 would prohibit you from discriminating on the basis of race with respect to that entire $100,000, the $10,000 in Federal funds, the $90,000 in other non-Federal funds.

The affect of the limitation of the new section 606, which is proposed by your bill, in that same program would be as follows: A program of $100,000, Federal funds of $10,000, the limitation in your bill would only limit the use of the $10,000 in Federal funds leaving available the other $90,000 to perform abortions.

Therefore, the limitation is different and more restricted than the limitation or condition imposed in section 601.

With respect to the other policies behind title VI, they are perfectly consistent with S. 522. This bill would impose a uniform policy in a multitude of Federal programs with which Congress must struggle with each year.

Second, you will ensure that—your bill will ensure that Federal funds are spent in accordance with the Constitution in the moral sense of the Nation.

There is no question constitutional that Congress may impose conditions on the grant of Federal funds, and they provide that such funds may be utilized for certain purposes, but not for other purposes. All Federal programs have such limitation. Federal highway funds are not to be used for performance of abortions; they are to be used for highways.

Hill-Burton funds are used for construction of hospitals, not to pay for surgical procedures of any kind.

Second, this condition is perfectly consistent with the *Roe* v. *Wade* decision in 1973. That question was disposed of by the Supreme Court in the case of *Harris* v. *McRae*. Now, those who come before you and argue that this bill is inconsistent with *Roe* v. *Wade* have an argument not with you or this bill or with Congress, but an argument with the Supreme Court. They lost that case and that case if they had won would have required Federal funding of abortion. They lost that case. The Supreme Court said that such a restriction on the use of Federal funds is not inconsistent with *Roe* v. *Wade*.

In addition, this bill would be in compliance with the moral sense of the Nation. The vast majority of people in the United States object to vigorously the payment of Federal funds for abortion. In part they believe that because they recognize that using Federal funds for abortion would be an assault upon the conscience of many millions of people in the United States that have an objection to involvement in abortion, including the payment of their funds for it.

Now let me address specifically the three objections which have been raised in prior testimony, and you have heard them today, with respect to the affect of S. 522. Now, first we have heard objections to the underlying congressional policy limiting payment for abortion.

Some people and the witnesses who have appeared before you today apparently object to that congressional policy. I can only say with respect to that that the policy is already in place, already well established by the Congress, and that this bill would not adopt a new or different policy, but would simply make that policy permanent under statutory law.

Second is that S. 522 goes beyond limiting the use of Federal funds for abortion.

Now, I have described in detail what the provisions of S. 522 provide and how they are different from the current restrictions imposed by section 601 on the question of racial discrimination.

Thus, since the restriction is different, since the restriction under your bill does not apply throughout a program or activity or apply to a recipient, indeed uses no such phrases, and it is conditioned only on the use of those Federal funds, then S. 522 would not prohibit any hospital that receives Federal financial assistance from using other non-Federal funds for the performance of abortions.

Second, and even more fancifully, is the notion that S. 522 would declare the unborn a person and reverse *Roe* v. *Wade*.

A simple reading of S. 522 can reveal readily that no such terms are utilized. The term "person" is not utilized in S. 522, just as the terms "recipient" and "Program or activity" are not utilized.

We know full well, Mr. Chairman, how to write a bill which would declare personhood by statute, and such bills have been proposed and considered by the Senate Judiciary Committee, including the Separation of Powers Committee, which in 1981 reported out a bill which would define the unborn to be a person for the purposes of the due process clause of the 14th amendment of the U.S. Constitution. And that bill said that:

> For the purpose of enforcing the obligation of the States under the 14th amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception . . . and for this purpose "person" shall include all human life as defined herein.

So that bill would have been an exercise of congressional power to define the unborn as a person. This bill does no such thing. And it is perfectly consistent with *Roe* v. *Wade* as the Supreme Court has declared in the *Harris* v. *McRae* case.

I think we should comment, though, for a minute on the extreme sensitivity of the American Civil Liberties Union, and Leadership Conference on Civil Rights, and other similar groups, whenever a bill such as this is considered. They realize, as I think you do, Mr. Chairman, that the *Roe* v. *Wade* decision was built on shifting sand. It is hanging literally by a thread and has been repudiated by most legal scholars who have examined its constitutional foundation.

The result of this insecurity about *Roe* v. *Wade* and its true constitutionality has resulted in various bizarre and fanciful arguments and have led the American Civil Liberties Union in particular to real extremes.

Let me give you an example. A few years ago there was a case that came before the West Virginia Supreme Court. That case involved a prosecution against a person who intentionally and brutally assaulted a pregnant woman, severely injuring her, and resulting in the death of her unborn child.

Now, the prosecutor brought a criminal action against this criminal assailant for killing the unborn child as well as injuring the woman.

On appeal the question was whether or not West Virginia law under its homicide statute or similar statutes could bring a criminal charge against someone who intentionally and criminally kills an unborn child. And the West Virginia Civil Rights Union came into the case—not on behalf of the woman who was the victim, but on behalf of the criminal assailant. And what they said was that *Roe* v. *Wade* prevents a State from protecting an unborn child from even a criminal assault against the woman, and, obviously, against the woman's consent.

The WVCLU had transformed *Roe* v. *Wade* from the freedom of the woman to decide to terminate her pregnancy to the freedom of a criminal assailant to decide to terminate her pregnancy.

Well, these hysterical and exaggerated claims you have heard about your bill come from this uneasiness and recognition that *Roe* v. *Wade* is so frail and built on such shifting sands that, if Government can recognize any protection for the unborn, even to the extent that Federal funds cannot be used to kill the unborn, that the very foundation of *Roe* v. *Wade* is jeopardized. And they are then on the slippery slope to reversal.

Finally, those who have objected to your bill have said that title VI is an inappropriate vehicle to implement congressional policy. Well, once you have answered the substantive arguments that have been attempted to be made against this bill, you then find that S. 522 would not limit, would not vitiate, would not restrict in any way the nondiscriminatory policy found in section 601 of the act. Indeed, your bill would not even amend section 601 of the act. Therefore, the restriction on racial discrimination continues forward in full force without any restriction or limitation.

Indeed, we have seen the alleged "sanctity" of the Civil Rights Act of 1964 violated—allegedly violated—numerous times when it has been amended to include a variety of matters including, as the chairman has pointed out, the amendment to title VII of the Civil Rights Act of 1964, which explicitly provides that employers shall not be required to fund abortions.

I really think, Mr. Chairman, that we have in this objection an aesthetic argument that somehow or another the majesty of the intent of the Civil Rights Act of 1964 would be violated by involving the enforcement of this congressional policy. We must realize, however, that it was Congress' Civil Rights Act of 1964. It is no person's or group's. It enacts congressional policies that are important, and that the procedures and enforcement of that policy are flexible and intended to include other circumstances when other matters need to be addressed.

Thus this aesthetic argument should not be used to prevent Congress from utilizing a vehicle that it created to effectuate a congressional policy it recognizes.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Bopp.

Let me just state that we will put all statements in the record as though they were actually delivered, so we will keep this record up to date.

[Prepared statement follows:]

Prepared Statement of James Bopp, Jr.

I appreciate the opportunity to appear before this Committee to testify concerning the desirability and legal effect of S.522, The Abortion Funding Restriction Act.

Since 1976, a substantial portion of my practice as an attorney has focused on the legal issues involved in ensuring full legal protection for all innocent human beings including the unborn. In this regard, I have served as General Counsel for the National Right to Life Committee and have chaired its Committees on the Human Life Amendment and Legislative Policy. I have chaired professional conferences at major universities including the Human Life Amendment Conference at St. Louis University in 1981. I have edited several books including *Restoring the Right to Life: The Human Life Amendment* (Brigham Young University Press, 1983) which focused on the legal and medical issues involved in restoring full legal protection to the unborn. For the information of the Committee, I have attached my resume to my written statement.

I am pleased to testify today in favor of S.522 which will make permanent the current Congressional policy of restricting the use of federal funds for abortions to only those circumstances in which the life of the pregnant woman is threatened. This important Congressional policy is currently contained in statutory law with respect to federal funds made available to the Department of Defense, 10 *U.S.C.A.* § 1093 (1985 Supp.) (effective Oct. 1, 1985), for family planning, 42 *U.S.C.A.* § 300a-6 (1982); 22 *U.S.C.A.* § 2151b(f)(1) (1985 Supp.), and for the Adolescent Family Life program. 42 *U.S.C.A.* § 300z-10 (1982).

In addition, this policy is reflected in riders on several appropriations bills which limit payment for abortions under any program administered by the Department of Health and Human Services, including the Medicaid program, the Indian Health Service (through HHS regulations), the Federal Employees Health

Benefit program, the District of Columbia appropriations bill (which also allows federal funds to be used for abortions in circumstances of rape and incest) and the Peace Corps.

S.522 would make permanent this Congressional policy, apply it uniformly, impose the restriction on the use of all federal funds and remove this issue from the annual appropriations debate.

S.522 has been criticized on several grounds:

(1) that the underlying Congressional policy is wrong.

(2) that the scope of S.522 goes beyond a limitation on use of federal funds to prohibit a recipient of federal funds from performing abortions, even with private funds, and

(3) that Title VI of the Civil Rights Act of 1964 is an inappropriate vehicle to implement this Congressional policy.

In order to respond to these criticisms, it is first necessary to understand the purpose of Title VI and its enforcement mechanism and how S.522 would fit within it.

Title VI of the Civil Rights Act of 1964

Purposes

The primary purpose of Title VI is to guarantee "that funds of the United States are not used to support racial discrimination." 110 Cong.Rec. 6544 (1964)(remarks of Sen. Pastore). See also 1964 U. S. Code. Cong & Ad. News 2355, 2391, 2400-2401, 2425; Regents of Univ. of California v. Bakke, 98 S.Ct. 2733, 438 U.S. 265 (1978). As a whole, Title VI is geared toward the effectuation of a uniform non-discrimination policy in a multitude of federally assisted programs. 110 Cong.Rec. 6544 (1964)(remarks of Sen. Pastore). The federal policy is accomplished by placing conditions on the receipt of federal funds and by enforcing compliance with these conditions in a flexible and fair manner. These assurances are often set forth in a contract between the federal government and the entity applying for or receiving financial assistance. See e.g. United States v. Marion County School Dist., 625 F.2d 607, 617, 618 (5th Cir. 1980)(Appendix setting forth agreement between school district and DHEW containing assurances of compliance with non-discrimination principle). Thus, the purpose of Title VI was to effectuate and strengthen an already extant federal non-discrimination policy. It created "no new Federal authority; it merely states how the authority conferred by other laws is to be administered." 110 Cong.Rec. 6546 (1964)(remarks of Sen. Humphrey). It articulated a principle recognized by many in government and by the Supreme Court and provided a procedural mechanism for uniformly enforcing that principle.

The non-discriminatory provision of Section 601 of Title VI, 42 U.S.C.A. § 2000d (1981), provides as follows:

> **Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin**
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The recipient of the federal financial assistance, therefore, may not discriminate against any person on the grounds of race, color or national origin under any program or activity of the recipient receiving federal financial assistance. Section 601 of Title VI is program specific. 42 U.S.C.A. § 2000d-1 (1981) provides that "termination or refusal (to provide future federal funds) shall be limited to the political entity, or part thereof, or other recipient as to whom a finding [of non-compliance] has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found." This program specifically entails the following results:

(1) if a program or activity of the

> recipient received federal financial assistance, the entire program must be non-discriminatory. Under the program receiving federal financial assistance, private funds may not be spent in a discriminatory manner.
>
> (2) Only the program or activity receiving federal financial assistance is required to comply with Title VI. Other programs and activities of the recipient which receive no federal funds are not covered.

Thus, if a state highway authority violates the non-discriminatory policy of Section 601 of Title VI, that state's funds for aid to dependent children would be unaffected. See Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969).

S.522, however, would impose a restriction on the recipients of federal funds which is more limited than the prohibition contained in Section 601 on racial discrimination. The operative language of S.522 provides that "no such (Federal financial) assistance shall be used to perform abortions except where the life of a mother would be endangered if the fetus were carried to term." S.522 only restricts the use of federal funds; it does not prohibit the recipient from performing or paying for elective abortions in any program or activity receiving federal funds. Thus, if the recipient has non-federal funds available, these non-federal funds may be used without regard to the limitation provided in S.522.

The sponsors of Title VI believed in the necessity for growth in the law--growth to meet the changing needs of a pluralistic society. The Civil Rights Act of 1964 was designed to meet the specific needs of the time. Yet, the non-discrimination principle behind Title VI is not bound to any place or time and its implementation mechanism is deliberately flexible, allowing the federal government to meet new civil rights needs and to resolve new civil rights disputes. Indeed, Title VI has inspired subsequent civil rights legislation such as Sec. 504 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 794 (1975).

Title VI is, as the New York Times recently wrote in an editorial critical of this bill, "the landmark law that prohibits racial discrimination in public accommodations and private employment." Editorial, Abortion Mischief, N. Y. Times, May 27, 1985. But it has other purposes as well. As Sen. Hubert Humphrey suggested in the 1964 Senate debate over the Civil Rights Act, Title VI was designed not just to effect a federal non-discrimination policy, but also "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong.Rec. 6544 (1964).

The moral sense of the nation, as evidenced by a consistent Congressional policy, opposes the expenditure of federal funds for abortion. Such a policy is in accord with the Constitution, as the Supreme Court has made clear in the case of Harris v. McRae, 448 U.S. 297 (1980). S.522 would utilize our civil rights law to give effect to the moral sense of the nation insofar as it is consistent with the Supreme Court's interpretation of the Constitution.

In addition, Title VI was designed to "avoid the recurrence of acrimonious debate in the Congress as to discrimination in discussing individual Federal aid programs." 110 Cong.Rec. 7061 (1964)(remarks of Sen. Pastore). Prior to the enactment of Title VI, controversy raged, not just over the level of funding of federally assisted programs, but also over what was at that time a controversial political question regarding racial discrimination. "...[T]o avoid such a situation...Title VI...constitute[d] as permanent policy of the U. S. Government the principle that discrimination will not be tolerated." Id. Thus, it was hoped that Title VI "would eliminate all the confusion and discussion that arise every time a grant bill comes before the Congress." Id.

Since 1976, appropriations riders each year have been enacted in Congress which limit federal funding of abortion. This yearly debate, like the earlier civil rights debates, centers not so much on the level of funding as on the question of whether a right to such funding exists. The Supreme Court and, for the past several years, Congress have said that such a right does not exist. The appropriations process is treacherous enough without being burdened with this political struggle. Just as Title VI enabled "Congress to consider the...issue of racial discrimination separately from the issue of desirability of any particular Federal assistance program," 110 Cong.Rec. 7062 (1964)(remarks of Sen. Pastore), S.522 will allow Congress to leave the divisive issue of abortion out of the appropriations debate. Subchapter 5 of Title 42 is an appropriate vehicle for unburdening the appropriations debate and resolving this policy dispute in as permanent a fashion as possible. It is flexible enough to permit the law to develop to meet modern legislative needs.

Enforcement of Title VI

We tend to see the non-discrimination clause of § 601 of Title VI as a beacon of principle without noticing the legislative and administrative apparatus that allows this beacon to shine at such a height. It is necessary to see how the whole statutory/regulatory scheme works in order to see that the Abortion Funding Restriction Act is actually a rather modest proposal. Under 42 U.S.C.A. § 2000d-1 (1981)(Title VI, § 602) "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity...is authorized...[to issue]...regulations...of general applicability" designed to achieve the objective set forth in § 601. These regulations must be approved by the Attorney General, who also coordinates their implementation and enforcement. Exec. Order No. 12,250, 45 Fed.Reg. 72,995 (1980). As a result, these regulations are fairly uniform in content. Compare 45 C.F.R. Part 80 (1984)(DHHS) with 32 C.F.R. Part 300 (1984)(DOD).

An examination of these regulations, as they now stand, will show that S.522 will simply add a few more paragraphs to the already voluminous regulations of a few government departments. S.522 would consolidate the statutory authority for abortion funding restrictions and insure a more coordinated and effective application of the *existing* law. Just as the early HEW guidelines for implementing Title VI were already "for the most part standards the federal courts established before the Guidelines were promulgated," *U.S. v. Jefferson County Board of Education*, 372 F.2d 836, 854 (5th Cir. 1966), so too will the guidelines arising out of S.522 be re-statements of already existing standards.

Let us take the DHHS regulations, 45 C.F.R. Part 80 (1984), as a representative sample. They begin with a statement of purpose and a discussion of the scope of their application. General and specific discriminatory practices are listed and explained. S.522 would change none of this except possibly it would require the inclusion of the non-funding of abortion principle in the statement of purpose.

A most important part of these regulations, from a practical standpoint, are the general assurances they require of an applicant or recipient of federal assistance. *See e.g.* 45 C.F.R. at 80.4; 32 C.F.R. at 300.6. In general, this provision requires that "(e)very application for Federal financial assistance...contain...an assurance that the program will be conducted...in compliance with all requirements imposed...pursuant" to the regulation. 45 C.F.R. at 80.4; 32 C.F.R. at 300.6. There is an additional requirement for continuing state programs in that they must provide for methods of administration as are found by the responsible Department official to give a reasonable assurance of compliance. 45 C.F.R. at 80.4(2)(b); 37 C.F.R. at 300.6(d)(b). The practical effect of S.522 would be to add another clause to these contracts requiring that the applicant refrain from spending federal money on abortions unless the life of the mother is endangered.

These regulations, in keeping with the spirit and letter of Title VI, are geared toward voluntary compliance. 42 U.S.C.A. § 2000d-1 (1981) prohibits any termination of funding unless, among other things, there has been a determination "that compliance cannot be secured by voluntary means." The implementing regulations urge department officials to seek cooperation in obtaining voluntary compliance "to the fullest extent practicable." Officials are to "provide assistance and guidance to recipients to help them comply." See 45 C.F.R. at 80.6; 32 C.F.R. at 300.7. The regulations attempt to facilitate an information flow between recipients and federal agencies to insure this compliance. See e.g. 45 C.F.R. at 80.12(b).

In order to police the agreement, each department is required to conduct a periodic review of recipients. Investigations and findings are to be made promptly. Intimidation and threats are prohibited. 45 C.F.R. at 80.7; 32 C.F.R. at 300.8.

If an investigation results in a finding of non-compliance, several things may happen. "Action is mandatory, but the procedure by which that action is accomplished is discretionary...." 110 Cong.Rec. 7058 (1964)(remarks of Sen. Pastore). First, there must be an attempt at inducing voluntary compliance. 45 C.F.R. at 80.8(d)(1); 32 C.F.R. at 300.9(d)(1). 42 U.S.C.A. § 2000d-1(2) allows that compliance may be effected "by any other means authorized by law." This includes seeking voluntary compliance, negotiation and a law suit on the contact. Yet no means apart from the attempt to secure voluntary compliance may be taken without notification of the recipient, the lapse of ten days, during which additional efforts secure voluntary compliance are to be made. 45 C.F.R. at 80.8(d)(3); 32 C.F.R. at 300.9(d)(4).

If negotiation fails, the government may terminate or refuse further assistance, but this action is hedged with restrictions and procedural safeguards. 42 U.S.C.A. § 2000d-1 (1981). No funds may be terminated without first notifying the appropriate House and Senate committee of a failure to comply. Id. The responsible federal official must then file a full written report explaining the circumstances and grounds for such action. Id. Moreover, no action may become effective until 30 days subsequent to the filing of the report. Id.

This is not all. There are also provisions for administrative hearings pursuant to a preliminary determination to terminate funding. 45 C.F.R. at 80.8(c)(2), 80.9; 32 C.F.R. at 300.9(2), 300.10. The applicant/recipient has a right to counsel for this proceeding. 45 C.F.R. at 80.9(c); 32 C.F.R. at 300.10(d). Even after an adverse decision, an applicant or recipient may be restored to eligibility by bringing himself into compliance and providing reasonable assurances that he will comply. 45 C.F.R. at 80.10(g); 32 C.F.R. at 300.11(g). If assistance is still denied, an applicant may request and shall be granted an expeditious hearing. Id.

Of course, administrative proceedings are often no substitute for judicial review. Therefore, 42 U.S.C.A. § 2000d-2 (Title VI, § 603) provides for judicial review of any department's final decision. Judicial review may be obtained in accordance with the Administrative Procedure Act. 5 U.S.C.A. §§ 701-706 (1977). The remedy for any problem that occurs under Title VI may take various forms--voluntary or negotiated compliance, judicial enforcement of specific performance of the assurances provided for in the implementary regulations, or termination of funding "in whole or in part." 45 C.F.R. at 80.10(f). Third party beneficiaries of affected programs may maintain a private cause of action to achieve compliance with Title VI, § 601, see e.g. Regents of University of Calif. v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978), but this is not relevant for the enforcement of the projected abortion funding restrictions since there is no one analogous to a program beneficiary in that context.

Given all of the procedural safeguards outlined above, it is unlikely that any recipient will be unjustly denied federal assistance. Under Title VI, if innocent third-party beneficiaries are denied the benefits of these programs, it is not because of federal intransigence or vindictiveness, but rather because of the willful non-compliance of the state agency or institution implementing the program. S.522 will not affect this state of affairs. All Title VI procedural safeguards will remain intact if federal funds for certain health programs are cut off or refused because of willful insistance on the part of the recipient to spend federal funds for elective abortions. See 110 Cong.Rec. 7059, 7060 (1964)(debate between Sen. Stennis and Sen. Pastore).

Objections to S.522

S.522, therefore, is compatible with the principle of Section 601 of Title VI and would have the intended effect: restricting the use of all federal funds to only life-saving abortions. Opponents to S.522, however, have raised several objections which will be examined in turn.

(1) The Congressional Policy underlying S.522 is wrong.

The Alan Guttmacher Institute, the research arm of Planned Parenthood, opposes S.522 in large part because its "most obvious and immediate impact would be to deprive permanently some 10,000,000 American women, whose medical care is normally paid for in whole or in part by the federal government, of access to abortion services." Memo on S.522, March, 1985, at 1. The 10,000,000 women, of whom the Guttmacher Institute speaks, are those who are eligible to receive health benefits under the following programs: Medicaid, Indian Health Service, Peace Corps Volunteers, Department of Defense, and Federal Employees Health Benefits.

S.522, of course, will not deprive any women "of access to abortion services." S.522 does not prohibit any women from getting an abortion, it only prevents the use of federal funds to pay for non-life-saving abortions. Private funds, or, for that matter, state and local government funds, may be utilized to pay for such abortions. S.522 simply prevents federal funds from being so utilized.

Once we are beyond the rhetorical obfuscations, however, Guttmacher's complaint is with current Congressional policy, not S.522. Each and every program affected by S.522 now prohibits federal funds for elective abortions. Thus, S.522 creates no new Congressional policy; it simply enacts it in statutory law.

(2) S.522 goes beyond limiting the use of federal funds to only life-saving abortions

The American Civil Liberties Union has complained that S.522 will have two effects beyond the limitation in the use of federal funds for only life-saving abortions:

> (a) S.522 would act as a bar to the performance of virtually all hospital abortions and
>
> (b) S.522 is an attempt to reverse Roe v. Wade on the grounds that it is a Congressional declaration that civil rights protection begins at the moment of conception.

Each of these claims are based on gross distortions of the language and effect of S.522. As set forth above, S.522 has two parts. First, S.522 provides that "nothing contained in the Civil Rights Act of 1964 shall be construed to authorize the use of federal financial assistance for abortions." This section prevents the Civil Rights Act from being construed to allow or require the use of federal funds for abortion. This section obviously places no limitations on receipt of federal financial assistance nor creates any substantial rights.

The second provision of S.522 provides that "no such (federal financial) assistance shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." This section provides the operative limitations on the use of federal funds. The ACLU, however, claims that the section would "act as a bar to the performance of virtually all hospital abortions" on the grounds that S.522 prohibits a recipient from utilizing private funds for performing abortions if it received federal financial assistance. ACCU, Issues Brief, April 1985, at 2.

As explained above, the racial discrimination principle currently in Section 601 of Title VI applies throughout any program or activity receiving federal financial assistance, and is applicable to private or non-federal funds used as part of the program or activity. S.522, however, is framed differently. It is not a prohibition on the activities of a recipient of federal funding assistance but a restriction on the use of federal funding assistance by the recipient. Thus, as long as federal funds are not utilized, the recipient of federal financial assistance, such as hospitals, may continue to allow the performance of elective abortions paid for with non-federal funds.

More absurd is the ACLU's claim that S.522 is "a bald attempt to reverse Roe v. Wade." Testimony of Norman Dorsen, April 2, 1984, at 3. This charge is based upon the claim that S.522 "would have the effect...to give fetuses the protection of Title VI from the moment of conception." Id. at 4. This claim is plainly false. S.522 does not amend Section 601 of Title VI to give the unborn any rights against discrimination. S.522 adds a new Section 606 which only prohibits the use of federal funds for non-life-saving abortions. In addition, S.522 does not declare the unborn to be a "person," as claimed by the ACLU, id. at 5, it simply provides that no federal funds may be used to kill unborn children, whether they are persons or not. It is obviously not necessary to declare an entity a "person" to protect it, nor does protecting it cause it to be a "person." See e.g. The Endangered Species Act of 1973, 16 U.S.C.A. § 1531 et seq., which provides that "(e)ach Federal agency shall...insure that any action...funded...by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species...." Id. 1536(a)(2). S.522 only prohibits the use of federal funds for non-life-saving abortions, a restriction fully consistent with Roe v. Wade and specifically upheld by the U. S. Supreme Court. Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

(3) Title VI is an inappropriate vehicle to implement the Congressional policy restricting federal funding of abortion.

Once the substantial objections to S.522 are disposed of, the remaining objections to the bill are based upon the "purity" of Title VI and are really aesthetic arguments masked as legal reasoning. S.522 would not limit, undermine or vitiate the non-discrimination principle found in Section 601 of Title VI nor effect its effective realization. The restrictions on the use of federal funds for abortion would simply be another condition to the receipt and use of federal health funds. In each health program, there are many such conditions, some required by the program act itself, and some required by other federal laws such as Title VI. These conditions are embodied in a contract, which normally does not delineate the source of the condition. For federally funded health programs, S.522 will simply require another condition to be included in the contract.

In addition, abortion is not a foreign concern under the Civil Rights Act of 1964. The Pregnancy Disability Act, an amendment to Title VII of the Civil Rights Act of 1964, provides that it "shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered...." 42 U.S.C.A. § 2000e(k)(1981).

Conclusion

S.522, therefore, is designed to recognize an already extant and constitutional policy and to enforce that policy uniformally and fairly. S.522 creates no new substantive rights for the unborn. Nor are any existing rights of women under Roe v. Wade affected since pregnant women currently have no right to a federally funded abortion. The bill merely recognizes that, under Harris v. McRae, a woman's right to abortion does not extend to the provision of federal funds to pay for it. Like Title VI which it amends, S.522 is a moderate but effective enforcement mechanism for an existing federal policy.

Senator Hatch. Would S. 522 prohibit hospitals that receive Hill-Burton funds or any other Federal financial assistance from performing privately funded abortions?

Mr. Bopp. Mr. Chairman, it would not do so.

Senator Hatch. What about a hospital that used Federal aid to build a new OB/GYN wing, would that trigger restriction?

Mr. Bopp. Well, S. 522, Mr. Chairman, would prevent the use of Hill-Burton funds to pay for the surgical procedure of abortion. I think that that restriction is already imposed upon the receipt of Hill-Burton funds. That it is to be used for certain purposes and not for other purposes.

It would have no other effect. Because the restriction imposed by your bill, the new section 606, does not prohibit a recipient of Federal financial assistance from doing certain things; it only prohibits the use of Federal financial assistance for abortions except those that are life savings.

Senator Hatch. Would this bill overturn in any way the Supreme Court decision in *Roe* v. *Wade?*

Mr. Bopp. I can see no such effect because the Supreme Court in *Harris* v. *McRae* has already declared that it is constitutional to limit the use of Federal financial assistance for abortions.

Senator Hatch. It has been said that abortion funding restriction is inappropriate for title VI because title VI is limited to racial discrimination.

Does a recipient of Federal financial assistance now have to comply with other conditions? Are any of these other conditions analogous to abortion funding?

Mr. Bopp. The section 601 of title VI, which is now in title 42, provides the racial discrimination prohibition. This is a new section 606 which imposes a more limited restriction on the use of Federal funds.

But the recipients of Federal funds must comply with a variety of restrictions and conditions.

I am, for instance, president of an organization called the National Legal Center for the Medically Dependent and Disabled, Inc. This center is a national support center for the Legal Services Corporation and is funded by Legal Services Corporation.

It has nothing to do with the question of abortion, but has to do with the rights of medically dependent and disabled persons to receive beneficial medical care.

In receiving that grant, LSC imposed upon us 14 general conditions and 10 specific conditions on the use of those funds beyond what is contained within the laws and regulations under the Legal Services Corporation Act.

The nondiscrimination provision is as follows, which happens to be paragraph 4:

"It shall not discriminate," which means the recipient of the fund. "It shall not discriminate on the basis of race, color, religion, sex, age, handicap, or national origin" against anyone who seeks to be employed or seeks to have the benefits of such program.

Now, neither this condition nor the other conditions in this grant cite any authority and this paragraph 4 does not cite title VI when it says "race, color, religion or national origin." It does not cite section 504 of the Rehabilitation Act of 1973 when it says "handicapped." It does not cite any other section when it says "religion, sex, or age."

It has a list, a series of conditions upon the use of Federal financial assistance under this program.

What the effect of your bill, as a practical matter, would be, is that if a program received Federal health funds, in addition to the 14 general conditions and the 10 specific conditions, there would be another condition—No. 15 perhaps—that would say that these Federal funds may not be used to pay for nonlifesaving abortions. And that would be, in practicality, the effect of your bill between the recipient and the Government.

Senator HATCH. Thank you, Mr. Bopp, for bringing your excellent legal knowledge to the committee's attention today on these issues.

I do not know of anybody who has greater legal knowledge on precisely what these issues are all about than you do, and I just want to express my appreciation for you being here today.

Mr. BOPP. Thank you very much, Mr. Chairman.

Senator HATCH. Thank you so much.

Our final witness will be Dr. Byron J. Masterson, M.D., University of Louisville School of Medicine.

Dr. Masterson, we are happy to welcome you to the committee. We look forward to taking your testimony.

Doctor, I have another conflict, so if you could summarize, I would appreciate it.

STATEMENT OF BYRON J. MASTERSON, M.D., UNIVERSITY OF LOUISVILLE SCHOOL OF MEDICINE

Dr. MASTERSON. I am Dr. Byron Masterson. I am a practicing obstetrician-gynecologist and chairman of the Department of Obstetrics and Gynecology at the University of Louisville School of Medicine.

I am here representing the American College of Obstetricians and Gynecologists, some 25,000 members, and the American Medical Association, with some 200,000.

We are pleased to offer our views on S. 522, the Abortion Funding Restriction Act.

Others have spoken of legal implications and the other implications of this bill. I want to speak to the practical problems this bill poses on someone that practices obstetrics and gynecology.

The American Medical Association and the American College of Obstetricians and Gynecologists oppose legislative proposals that utilize Federal or State health care funding mechanisms to deny established and accepted medical care to any segment of the population. Our organizations believe that it is highly inappropriate to restrict access of a designated population to an accepted and legal medical procedure, abortion, and we believe a restriction is highly discriminatory and detrimental to the quality of care which should be made available to all individuals in our country.

We have already stated our longstanding opposition to such language on appropriations and funding measures. This testimony will emphasize that use of such language within the context of the Civil Rights Act of 1964, as sought in S. 522, holds even more onerous and damaging possibilities to patient care, particularly obstetrics, and more importantly to the women of this Nation whom we seek to serve, than the current Hyde amendment.

We are seriously concerned that this proposed amendment to the Civil Rights Act will severely interfere with medical care and the patient-physician relationship.

The proposed amendment also could cause the elimination of contraceptive services, antenatal diagnosis screening for genetic abnormalities, currently available legal abortion services, and ultimately remove the option of abortion for those couples known by virtue of such tests to be carrying a severely deformed infant.

Medicine in the United States has made great strides in improving the health status of American women, with maternal mortality dropping from 582 deaths to 9 deaths per 100,000 live births over the last 50 years.

Obstetrician-gynecologists specialize in reproductive health care with a higher objective of assuring that intended pregnancies are brought to term with the best outcome that nature will permit. While we do not profess to be expert in the details of civil rights law—indeed I listened intently to the testimony—we are experts in understanding the pregnant woman, her family, and the complex and emotional trauma that a family faces when confronted with a problem pregnancy either jeopardizing the woman's health or resulting in a severely deformed and potentially doomed fetus as in the case of Tay-Sachs disease.

We are most aware of the technology and methods of family planning available to the woman seeking to avoid pregnancy by use of current methods of contraception. These methods may very well become suspect under provisions like those in S. 522.

Legal opinions indicate that proposals like S. 522 are not significantly different from previous legislative proposals—S.J. Res. 17, 18, and 19 offered in the 97th Congress. These proposals sought to deem a status of personhood for the fetus.

While the approach in S. 522 is clearly more subtle than the direct course in these proposals and in a constitutional amendment later defeated by the Senate, the outcome would nonetheless be the same.

While proponents of the legislation would have us to believe that it is only direct Federal support for abortion services which the legislation seeks to proscribe permanently, the nature of title VI of the Civil Rights Act argues against this most conservative interpretation.

This bill would, we believe, give the fetus the full array of civil rights equal and possibly in conflict with those of the mother. It is a more subtle statement of the personhood of the fetus than proposals which have come before the Congress, but nevertheless would have the same impact.

We are concerned that an amendment to title VI of the Civil Rights Act with the language contained in S. 522 could be interpreted broadly and would therefore deter hospitals or other facilities receiving Federal financial support from conducting legitimate activities or programs which are designed to protect the health of women simply labeling those activities "discrimination against the fetus." It is not unforeseeable that, at a minimum, departments of obstetrics and gynecology which conduct programs of genetic screening, in vitro fertilization, provide family planning services, and perform fetal surgery would be prevented from such activities.

Nearly all of this Nation's 4,000 hospitals which serve women benefit or have benefited from Federal dollars, be it Federal construction aid, direct grant aid, or revenues for patient care from Federal health entitlement programs, and would therefore be held to this nondiscrimination provision and be compelled to eliminate these vital programs of assistance, or forfeit essential Federal dollars. If this legislation is allowed to interfere with the quality health care for women, it is the community which the hospital serves which will bear the ultimate sacrifice.

Practicing physicians face a number of clinical conditions where the prospect for the embryo or fetus are in question and the health of the woman is jeopardized; for example, patients who develop complications late in pregnancy, such as toxemia, a disease characterized by high blood pressure, convulsions, and possible death. At present, the optimal medical intervention is to deliver the fetus early to avoid a threatening situation for both woman and fetus.

While efforts are made to save this, in most cases, premature infant, it may very well die.

Will physicians under provisions of S. 522 be discriminating against the fetus during such preventive measures for the mother?

An ectopic pregnancy, occurring when a fertilized egg implants in a fallopian tube, illustrates another condition when a responsible physician will operate and remove this pregnancy because if it should rupture in the abdomen, it can easily become a threat to the life of the woman. And this is not a rare condition; this is a leading cause of maternal death in some Eastern States.

A threat to the life of the woman in a situation must be considered.

Senator HATCH. Of course, you know we have the protection of the life of the mother very carefully delineated in this bill.

Dr. MASTERSON. I understand, but the complexities and the nature of these kinds of circumstances is such that it would greatly complicate the management of these patients.

Would such decisions in the future be cause for leveling civil rights charges against physician and mother as they opt to protect the welfare of the woman above all else? Will Federal funds to that hospital be in jeopardy by virtue of their decision and will the community which that hospital serves have to decide between the economic well-being of the hospital in the form of Federal financial assistance or the ultimate medical well-being and quality of care which the patients in that hospital deserve?

Current forms of contraception available in hospitals, outpatient clinics, and physician offices have the potential to be viewed as discriminatory since in some instances both the IUD and the low-dose oral contraceptives act to interrupt the fertilized egg and disrupt the continuation of pregnancy. To the more than 12 million women who consult with their physician and opt for these methods of family planning, S. 522 would result in reducing their access to such methods and increasing their chances for an unintended and likely unwanted pregnancy.

Tragically, medicine has not found a prevention for degenerative diseases affecting children which may die from disastrous diseases; for example, Tay-Sachs disease and others, as a case in which the parents are up against several years of progressive deterioration and debilitation and a tragic chain of circumstances. Antenatal diagnosis would clearly be suspect under this proposal and it is one of the more rapidly developing areas in obstetrics. In fact, the option to even study genetic abnormalities may be elimianted.

For the 15 percent of the American population who experience infertility which finds them unable to bear children, a growing area of science is opening hope for future childbearing. New technology and understanding of reproductive science has aided physicians and researchers to advance the technology of in vitro fertilization/embryo transplant which has resulted in the birth of more than 1,000 children to parents who thought their dream would never be realized.

At the University of Utah in Salt Lake City, an institution which has been at the forefront of technology and medical innovation, an in vitro program is active and benefits from referrals from hospitals all over the State, including those operated by the Church of the Latter-day Saints. Scientific protocol appropriately demands that all embryos be aimed at successful pregnancy, but some are mistimed and will not result in pregnancy.

Under title VI, protections proposed in this bill, discrimination could be alleged against the in vitro program since we know that some fertilized embryos go unused for reproduction.

Mr. Chairman and members of the subcommittee, we raise these questions and concerns regarding the proposal as evidence that there is nothing straightforward nor simple, no matter how straightforward or simple the language was intended, with this juncture with the civil rights amendment that will result from the ramifications from passage of this bill.

The stated goal of the proponents of this bill, a permanent ban on the use of Federal funds for abortion, can be achieved without involvement of the Civil Rights Act with its far-reaching ramifications.

We are convinced that this bill would go much farther than simply denying Federal funds to support the performance of abortion and, instead, intercede in many other conditions which all women—pregnant or not—face regarding their reproductive health.

We urge that the subcommittee reject this measure and urge your consideration of these other matters.

[The prepared statement of Dr. Masterson follows:]

PREPARED STATEMENT OF BYRON J. MASTERSON

Mr. Chairman and Members of the Subcommittee:

I am Dr. Byron J. Masterson. I am a practicing obstetrician-gynecologist and Chairman of the Department of Obstetrics and Gynecology at the University of Louisville School of Medicine. I am a Fellow of The American College of Obstetricians and Gynecologists (ACOG), the specialty organization of over 25,000 physicians providing reproductive health care for women. Today, I am representing the American Medical Association and The American College of Obstetricians and Gynecologists. We are pleased to offer our views today concerning S. 522, the "Abortion Funding Restriction Act."

S. 522 would amend the Civil Rights Act of 1964 to, as stated by Senator Hatch, make permanent in law the language of the so-called "Hyde Amendment". This amendment, historically attached to appropriations measures, prohibits the use of federal financial assistance for abortions except in cases where the life of the mother would be endangered if the fetus was carried to term. The American Medical Association and The American College of Obstetricians and Gynecologists oppose legislative proposals that utilize federal or state health care funding mechanisms to deny established and accepted medical care to any segment of the population. Our organizations believe that it is highly inappropriate to restrict access of a designated population to an accepted and legal medical procedure, abortion. Such a restriction is highly discriminatory and detrimental to the quality of care which should be made available to all individuals in our country.

Having already stated our longstanding position in opposition to such language on appropriations and funding measures, this testimony will emphasize that use of such language within the context of the Civil Rights Act of 1964, as sought in S. 522, holds even more onerous and damaging possibilities to patient care, particularly obstetrics, and, more importantly, to the women of this nation whom we seek to serve, than the current "Hyde Amendment" restrictions. We are seriously concerned that this proposed amendment to the Civil Rights Act will severely interfere with medical care and the important physician-patient relationship.

It is also possible that the proposed amendment could cause the elimination of contraceptive services, antenatal diagnosis screening for genetic abnormalities, currently available legal abortion services, and ultimately remove the option of abortion for those couples known by virtue of such tests to be carrying a severely deformed infant.

Medicine in the United States has made great strides in improving the health status of American women. Obstetrician-gynecologists specialize in reproductive health care with a higher objective of preventing unintended pregnancy and to assure that all intended pregnancies are brought to term with the best outcome that nature will permit. While we do not profess to be expert in the details of Civil Rights law, we are expert in understanding the pregnant woman, her family, and the complex and emotional trauma that a family faces when confronted with a problem pregnancy either jeopardizing the woman's health or resulting in a severely deformed and potentially doomed fetus as in the case of Tay-Sachs disease.

We are most aware of the technology and methods of family planning available to the woman seeking to avoid pregnancy by use of current methods of contraception. These methods may very well become suspect under provisions like those in S. 522.

Legal opinions indicate that proposals like S. 522 are not significantly different from previous legislative proposals -- S.J. Res. 17, 18, and 19 offered in the 97th Congress. These proposals sought to deem a status of personhood for the fetus. While the approach in S. 522 is clearly more subtle than the direct course in these proposals and in a Constitutional amendment later defeated by the Senate, the outcome would nonetheless be the same. While proponents of the legislation would have us to believe that it is only direct federal support for abortion services which the legislation seeks to proscribe permanently, the nature of Title VI of the Civil Rights Act argues against this most conservative interpretation. Placement of the provisions of S. 522 into Title VI of the civil rights statute which provides "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" would, we believe, give the fetus the full array of civil rights equal and possibly in conflict with those of the mother. It is a more subtle statement of the personhood of the fetus than proposals which have come before the Congress but nonetheless would see the same impact.

We are concerned that an amendment to Title VI of the Civil Rights Act with the language contained in S. 522 could be interpreted broadly and would therefore deter hospitals or other facilities receiving federal financial support from conducting legitimate activities or programs which are designed to protect the health of women simply by labelling those activities "discrimination against the fetus." It is not unforeseeable that, at minimum, departments of obstetrics and gynecology which conduct programs of genetic screening, in vitro fertilization, provide family planning services, and perform fetal surgery would be proscribed from such activities. Nearly all of this nation's 4,000 hospitals which serve women benefit or have benefited from federal dollars, be it federal construction aid, direct grant aid, or revenues for patient care from federal health entitlement programs, and would therefore be held to this non-discrimination provision and be compelled to eliminate these vital programs of assistance, or forfeit essential federal dollars. If this legislation is allowed to interfere with quality health care for women, it is the community which the hospital serves which will bear the ultimate sacrifice.

Practicing physicians face a number of clinical conditions where the prospect for the embryo or fetus are in question and the health of the woman is jeopardized; for example, patients who develop complications late in pregnancy such as toxemia, a disease characterized by high blood pressure, convulsions, and possible death. At present, the optimal medical intervention is to deliver the fetus early to avoid a threatening situation for both woman and fetus. While efforts are made to save this, in most cases, premature infant, it may very well die. Will physicians under provisions of S. 522 be discriminating against the fetus during such preventive measures for the mother? An ectopic pregnancy, occurring when a fertilized egg implants in a Fallopian tube, illustrates another condition when a responsible obstetrician-gynecologist will operate and remove this pregnancy because if it should rupture in the abdomen it can easily become a threat to the life of the woman. To do so is a preventive measure done to avoid a potential life threatening situation. Will such decisions in the future be cause for leveling civil rights charges against physician and mother as they opt to protect the welfare of the woman above all else? Will federal funds to that hospital be in jeopardy by virtue of their decision and will the community which that hospital serves have to decide between the economic well-being of the hospital in the form of federal financial assistance or the ultimate medical well-being and quality of care which the patients in that hospital deserve?

Current forms of contraception available in hospitals, outpatient clinics, and physician offices have the potential to be viewed as discriminatory since in some instances both the IUD and the low-dose oral contraceptives act to interrupt the fertilized egg and disrupt the continuation of pregnancy. To the more than 12 million women who consult with their physician and opt for these methods of family planning, S. 522 would result in reducing their access to such methods and increasing their chances for an unintended and likely unwanted pregnancy.

Tragically, medicine has not found a prevention for degenerative diseases affecting children which we know from birth will limit their life span, dooming them to die in early childhood. Tay-Sachs disease, as an example, is a case where parents of an affected child are up against possibly three years of progressive debilitation and a tragic chain of circumstances for both parents and others in the family. Antenatal diagnosis would clearly be suspect under this proposal and the option to screen for genetic abnormalities and subsequent abortion would be eliminated for the families known to be at risk.

For the 15 percent of the American population who experience infertility which finds them unable to bear children, a growing area of science is opening hope for future childbearing. New technology and understanding of reproductive science has aided physicians and researchers to advance the technology of in vitro fertilization/embryo transplant which has resulted in the birth of more than one thousand children to parents who thought their dream would never be realized. At the University of Utah in Salt Lake City, an institution which has been at the forefront of technology and medical innovation, an in vitro program is active and benefits from referrals from hospitals all over the state including those operated by the Church of the Latter-Day Saints. Scientific protocol appropriately demands that all embryos resulting from the husband and wife be aimed at a successful pregnancy. Yet, it is known that some are mistimed and not able to be utilized to achieve that purpose. Under Title VI protections proposed in S. 522, discrimination could be alleged against the in vitro program since we know that some fertilized embryos go unused for reproduction.

Mr. Chairman and Members of the Subcommittee, we raise these questions and concerns regarding the proposal as evidence that there is nothing straightforward nor simple about the ramifications likely upon passage of S. 522. The stated goal of the proponents of S. 522, a permanent ban on the use of federal funds for abortion, can be achieved without involvement of the Civil Rights Act with its far-reaching ramifications. We are convinced that S. 522 would go far beyond simply permanently denying federal funds to support the performance of abortion and instead, intercede into the personal decisions which all women -- pregnant or not -- face regarding their reproductive health. We urge that the Subcommittee, wisely, reject this measure.

Thank you.

Senator HATCH. Well, thank you so much, Doctor. We appreciate your taking time to come and testify before this committee today.

With that, we will recess these hearings until further notice.

[Whereupon, at 11:44 a.m., the hearings in the above entitled matter recessed sine die.]

APPENDIX

STATEMENT
OF
LOIS C. WALDMAN
ACTING DIRECTOR
COMMISSION ON LAW AND SOCIAL ACTION
AMERICAN JEWISH CONGRESS

HEARING ON S.522, THE ABORTION FUNDING RESTRICTION ACT

The American Jewish Congress welcomes this opportunity to express its opposition to S.522, a bill which would amend the Civil Rights Act of 1964 to prohibit use of federal financial assistance to perform abortions except when the life of the mother is endangered by the pregnancy. This bill is disguised simply as a permanent codification of the "Hyde Amendment." In fact, however, by attempting to extend the protections of the 1964 Civil Rights Acts to unborn fetuses, this bill seeks Congressional imprimatur on the notion that life begins at the moment of conception -- a determination the Supreme Court has held the Constitution places outside governmental authority.

In addition, debate on the merits of S.522 will necessarily become entangled with, and undoubtedly confuse, the critical debate on the proper reach of Title VI in civil rights cases. Debate on S.522 will impede Congress' effort to deal with the longstanding need to correct gaps in the federal civil rights laws which have emerged in the wake of Grove City College v. Bell, 104 S.Ct. 1211(1984)

I. The Jewish Tradition and Access to Abortion

Classical Jewish tradition, as interpreted by contemporary rabbinic authorities, encompasses a wide range of opinion. Despite these wide divergencies, certain general principles of Jewish tradition are broadly accepted:

1) The fetus is not a "person" in Jewish tradition until the moment of birth. The normative view of Jewish law with respect to the fetus is that expressed by Rashi in the Talmud Tractate Sanhedrin:

> Whatever has not come forth into the light of the world (i.e. the mother's birth canal) is not a human life.

In no circumstance is abortion a capital offense.

2) If the fetus up to the moment of birth, and even during the very process of birth, threatens the life of the mother, the life of the mother takes precedence. Further, this is not a matter of choice, but of religious imperative.

3) Even the most lenient approach to abortion in Judaism considers termination of the life of the fetus as morally objectionable if it is done for less than serious cause. What constitutes such serious cause divides Orthodox Jewish opinion. Conservative and Reform Judaism hold a more lenient view of what constitutes a serious cause and leave the ultimate determination of serious cause to the woman.

4) The final point of consensus is that if an abortion is performed, even in situations where Orthodox tradition would not sanction it, such an abortion would not incur criminal punishment in a Jewish court.

What the above suggests -- and most particularly what the final point suggests -- is that Jewish tradition, while treating abortion as a serious moral issue, also recognizes the highly personal dimension of the decision to abort or to carry the fetus to term.

The recognition within Jewish tradition of the highly personal dimension of a woman's decision to abort is echoed by constitutional doctrine. In Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 174 (1973), the United States Supreme Court held that women have a fundamental right of personal liberty, protected by the United States Constitution, up until the third trimester, to choose to have an abortion, and that government may not make access to obtain an abortion so unreasonably difficult as to impede that right.

Those who oppose abortion, who seek to impose their moral view on women to deprive them of this fundamental right, have mounted a campaign to chip away at women's access to abortion facilities. Over vigorous dissents -- which we hope will ultimately prevail -- the Supreme Court has upheld restrictions on use of public funds and facilities for abortions. See William v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977). As a result of various laws, abortion funding bans have been imposed on federal programs, usurping control over the medical choices of some 10 million women of childbearing age. These women include:

- -- Medicaid recipients
- -- Native Americans
- -- Peace Corps Volunteers
- -- Active Duty Military Personnel, retirees and their dependents
- -- Federal Employees and their dependents.

These abortion funding restrictions affect most severely those women least able to obtain abortions, forcing many poor women to forego their right to abortion, or to endanger their health by attempting to abort themselves, or to risk depriving themselves and their families of the necessities of life in order to raise money for an abortion.

S.522 seeks to make permanent the denial of abortions to those who can least afford them -- and, ironically, those who are least financially capable of supporting their unwanted children. And where, we ask, are the federal dollars to help these women support the children that this legislation will force them to carry to term?

Amending the 1964 Civil Rights Act is a transparent effort to tie the protections against discrimination that Title VI provides to the American public to the unborn, thereby conferring on them a de facto "citizenship by association." As noted above, that is a matter which the Supreme Court has expressly held is beyond Congress' purview. But more importantly, the cost of raising new "citizens" is borne by society's already overburdened disadvantaged.

In the Jewish tradition, men and women are the bearers of the divine image -- they are created in God's own likeness -- and Jewish tradition views life, including that of the unborn, as the most precious of God's gifts. But this very commitment to a life-revering tradition is precisely what leads us to oppose S.522. Jewish tradition reflects the belief that, in the long run, life is diminished, demeaned and desecrated far more by callousness and insensitivity to the born, than the unborn -- however precious their future promise. That is why this legislation is ill-advised. In the name of promoting life, S.522 denigrates the lives of million of women, who are effectively prevented from exercising the most fundamental aspect of personal freedom, the right to have control over her own body.

II. S.522 and the Civil Rights Restoration Act

As this Committee is aware, Congress is now debating the merits of the Civil Rights Restoration Act. That proposal, along with other, more modest efforts, seek to overturn the Supreme Court's decision in Grove City College v. Bell, 104 S.Ct. 1211 (1984), to provide that when an institution receives federal funds all component parts of the institution are covered by the requirements of federal anti-discrimination law. The effect of that legislation will be to insure that those whom Congress sought to protect through various anti-discrimination laws -- such as Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, as amended in 1972, the Age Discrimination Act of 1975, and most significantly, Title VI of the Civil Rights Act of 1964 -- will be covered.

The proposals to amend the laws affected by Grove City will, if successful, reinforce the ability of private litigants to enjoin any covered institution receiving federal funds which engages in racial discrimination. This effect is, quite obviously, very significant and deserves full and complete debate by the Senate.

The effect, however, of attaching S.522 to Title VI is nothing less than parliamentary mischief. Read broadly, the language of S.522 could be interpreted to permit litigants to use the enforcement mechanisms of Title VI to prevent the performing of abortions in any facility receiving federal funds covered by Title VI, even if those federal funds are not used for the abortion facilities. Thus any hospital, medical facility or clinic that receives federal funds -- such as medicaid -- would be barred from performing abortions. This bar would severely restrict the ability of women -- particularly poor women -- to have access to medically safe abortion facilities. Arguably, such a severe impediment to abortion facilities is unconstitutional. Doe v. Bolton, supra. It is, in effect, a penalty for those providing abortion services -- services which, it must be emphasized, are constitutionally protected. It is therefore unconstitutional. See Harris v. McRae, 100 S.Ct. 2671, 2688 n.19.

In addition, S.522 throws a parliamentary monkey-wrench into the debate on the Civil Rights Restoration Act. Those who favor passage of the Civil Rights Restoration Act are faced with the paradox of restoring enforcement of anti-discrimination laws against women while at the same time, because of S.522, restricting their consitutional right to abortion.

* * * * * *

Both S.522 and the Civil Rights Restoration Act are legislation which command serious debate on their merits. Entwining one with the other, by amending Title VI with S.522, can only create confusion among those interested in protecting the rights of American citizens.

We respectfully urge this Committee to reject S.522.